



REPORT

ON

THE NON-POSSESSORY
REPAIRMAN'S LIEN

ONTARIO LAW REFORM COMMISSION

1972

MINISTRY OF THE ATTORNEY GENERAL



REPORT

on

THE NON-POSSESSORY REPAIRMAN'S LIEN

ONTARIO LAW REFORM
COMMISSION

1972

MINISTRY OF THE ATTORNEY GENERAL


The Ontario Law Reform Commission was established by section 1 of *The Ontario Law Reform Commission Act*, 1964, for the purpose of promoting the reform of the law and legal institutions. The Commissioners are:

H. ALLAN LEAL, Q.C., LL.M., LL.D., *Chairman*
HONOURABLE JAMES C. MCRUER, O.C., LL.D., D.C.L.
HONOURABLE RICHARD A. BELL, P.C., Q.C.
W. GIBSON GRAY, Q.C.
WILLIAM R. POOLE, Q.C.

Edward F. Ryan, LL.B., LL.M., is Counsel to the Commission. The Secretary of the Commission is Miss A. F. Chute, and its offices are located on the 16th Floor at 18 King Street East, Toronto, Ontario, Canada.

TABLE OF CONTENTS

	PAGE
CHAPTER I	THE PRESENT LAW IN ONTARIO 7
	1. Creation and Extent of the Lien 7
	2. Persons Entitled to the Lien 9
	3. Rights of the Lienholder as Against Third Parties 9
	4. Deficiencies in the Present Law 11
CHAPTER II	THE LAW IN OTHER JURISDICTIONS 13
	1. The United Kingdom 13
	2. The United States 13
	3. Other Canadian Provinces 14
	4. Summary 18
CHAPTER III	PROVIDING FOR A NON-POSSESSORY LIEN IN ONTARIO 21
	1. <i>The Personal Property Security Act</i> 21
	2. Types of Chattels to be Covered by the Non-Possessory Lien 26
	3. The Non-Possessory Repairman's Lien—A Proposed Legislative Framework 28
	(i) Creation of the Lien 29
	(ii) Priorities 30
	a. Priority Between the Non-Possessory Lien and a Security Interest Created Under <i>The Personal Property Security Act</i> 32
	b. Priority Between the Non-Possessory Lien and the Interest of a <i>Bona Fide</i> Purchaser for Value 33
	c. Priorities Among Two or More Liens.. 33
	(iii) Seizure and Sale of the Vehicle 34
CHAPTER IV	STORAGE COSTS 37
CHAPTER V	SUMMARY OF RECOMMENDATIONS 41
CHAPTER VI	CONCLUSION 47
	APPENDICES 49



Digitized by the Internet Archive
in 2011 with funding from
Osgoode Hall Law School and Law Commission of Ontario



ONTARIO LAW REFORM COMMISSION

TO THE HONOURABLE DALTON BALES, Q.C.

ATTORNEY GENERAL FOR ONTARIO

Dear Mr. Attorney:

Pursuant to the provisions of section 2 (1) (d) of *The Ontario Law Reform Commission Act*, R.S.O. 1970, c. 321, the Commission was asked to consider and report on the desirability of extending the present law in Ontario, under which a person who has bestowed skill, labour or money upon personal property has a lien for his services so long as he remains in possession of the property, to allow the preservation of the repairman's lien after the surrender of possession of the property. The concept of the non-possessory lien is not new; legislation conferring a non-possessory lien with respect to the repair of certain chattels, namely motor vehicles and, in some cases, aircraft, has been in existence for some time in the four western provinces of Canada, and in 1955 a Select Committee of the Ontario Legislature recommended the enactment of legislation in Ontario to provide for a non-possessory lien with respect to the repair of motor vehicles. In this report, although the framework of analysis embraces the wider context of the repair of any kind of chattel, the Commission concludes that the non-possessory lien should be restricted for the present to the repair of vehicles, to be defined, however, very broadly.

It should be stressed that the scope of the report is narrow in that it focuses on a particular lien given at common law, namely a lien given upon a chattel for labour, skill or expense bestowed in respect thereof, the thrust of the analysis being towards ascertaining in what circumstances and in what respect the lien should be extended. The report is not concerned with general liens arising at common law, such as a solicitor's lien or a banker's lien, nor is it generally concerned with statutory liens, such as a mechanic's lien against land or the lien of an unpaid seller of goods. Similarly, equitable liens, such as an unpaid vendor's lien on a sale of land or the lien acquired in certain circumstances by a person for improvements made to land, are beyond the scope of this report.

The report which follows considers the problems involved in providing for a non-possessory lien in Ontario. The principal problems appear to arise on two levels: first, in attempting to establish rules governing the creation of the lien and the rights of the lienholder against the owner of the chattel in the absence of the claims of any other persons, and secondly, in attempting to balance the rights of the lienholder against those of third parties claiming an interest in the same chattel. The question of priorities is a difficult one and is not easily resolved. In addition, since the non-possessory lien is a form of security interest, underlying the analysis must be a consideration of *The Personal Property Security Act*, R.S.O. 1970, c. 344, the main question being whether and to what extent the non-possessory lien can or should be integrated into the somewhat complex legislative framework established by that statute. Finally, the report also makes certain recommendations concerning changes in the current legislative provisions dealing with the power of sale of a possessory lienholder which in the view of the Commission will become desirable when *The Personal Property Security Act* is in full force and effect in this Province.

The Commission now submits its report respecting this subject.

CHAPTER I

THE PRESENT LAW IN ONTARIO

A consideration of the law in Ontario governing the lien acquired by a person who works on the chattels of another will form the basis of the first chapter of this report. Four areas will be examined: the creation and extent of the lien, persons entitled to the lien, the rights of the lienholder as against third parties, and deficiencies in the present law.

1. CREATION AND EXTENT OF THE LIEN

When a workman bestows skill, labour or money upon personal property with the express or implied authority of the owner, a particular lien attaches to such property at common law and continues in existence so long as the property remains in the lien claimant's possession.¹ There can be no lien upon any property unless it is in the possession of the person claiming the lien,² and the lien gives the workman the right to retain possession of the property until the reasonable charges for his services have been paid or satisfied, unless the lien is inconsistent with the terms of the contract of repair.³ The lien extends only to the goods in the repairman's possession upon which the work was performed, but not to other goods previously released.⁴ The lien usually arises by implication of law, as an incident of the contract to repair, and is rooted in possession; it is lost if possession is given up, and remains lost even though possession is later regained.⁵ An exception to this, however, occurs when there is a conditional surrender of possession by the person claiming the lien, on the understanding that the lien will continue notwithstanding the surrender of possession.⁶ Such a lien would appear to be based directly on contract, and indeed it has been held that a lien may arise by contract.⁷ Finally, the lien applies, apart from agreement, express or implied, only to the sum actually due to the repairman for materials and labour expended by him

¹ *Bevan v. Waters* (1828), Mood. and M. 235, 173 E.R. 1143; (1828), 3 Car. and P. 520, 172 E.R. 529.

² *Crabtree v. Griffith* (1863), 22 U.C.Q.B. 573.

³ *Chase v. Westmore* (1816), 5 M. and S. 180.

⁴ *Kendal v. Fitzgerald* (1862), 21 U.C.Q.B. 585.

⁵ *Hackett v. Coghill* (1903), 2 O.W.R. 1077, aff'd 3 O.W.R. 827.

⁶ *Traders Finance Corporation Limited v. Bond Motor Sales*, [1954] O.W.N. 785. At least one writer has tried to rationalize this exception by saying that where there is a conditional surrender of possession by the bailee repairman, the deliverer is really the repairman's agent, so that the possession of the deliverer is really that of the repairman, and the latter does not lose his lien. See Pool, "Agister's Lien—Scope of Lien—Requirement of Possession" (1961), 26 Mo. L.R. 105.

⁷ *Byers v. McMillan* (1887), 15 S.C.R. 194.

and does not extend to warehousing charges; a person who has a lien upon a chattel and keeps the chattel in order to enforce his lien (that is, for his benefit) cannot make a claim for so keeping it.⁸

In the absence of agreement, the lienholder has no right at common law to sell the chattel upon which he has performed the repairs,⁹ but in 1878 the predecessor to what is now section 48 of *The Mechanics' Lien Act*¹⁰ first appeared in Ontario,¹¹ and gave the lienholder, in addition to any other remedy to which he may be entitled, the right of selling, upon compliance with the conditions set out in the section, the personal property to which the lien attached. Section 48 reads as follows:

48.—(1) Every person who has bestowed money, skill or materials upon any chattel or thing in the alteration or improvement of its properties or for the purpose of imparting an additional value to it, so as thereby to be entitled to a lien upon the chattel or thing for the amount or value of the money or skill and material bestowed, has, while the lien exists but not afterwards, in case the amount to which he is entitled remains unpaid for three months after it ought to have been paid, the right, in addition to any other remedy to which he may be entitled, to sell by auction the chattel or thing on giving one week's notice by advertisement in a newspaper having general circulation in the municipality in which the work was done, setting forth the name of the person indebted, the amount of the debt, a description of the chattel or thing to be sold, the time and place of sale, and the name of the auctioneer, and leaving a like notice in writing at the last known place of residence, if any, of the owner, if he is a resident of the municipality.

(2) Such person shall apply the proceeds of the sale in payment of the amount due to him and the costs of advertising and sale and shall upon application pay over any surplus to the person entitled thereto.

It may be noted that section 48 does not attempt to create or confer a lien but merely recognizes the common law possessory lien,¹² and confers an additional remedy on the lienholder, namely the power of sale. Such a power of sale extends to every person who is entitled to a lien by virtue of altering or improving personal property by the bestowing of money, skill or materials upon such property, does not arise until the lienholder has remained unpaid for three months, and is subject to certain requirements as to notice. Since the section does not itself create the lien,

⁸ *Somes v. British Empire Shipping Company* (1860), 8 H.L. Cas. 338; *Canadian Gas Power and Launches Limited v. Schofield* (1910), 15 O.W.R. 847; *Katzman v. Mannie* (1919), 46 O.L.R. 121; *Heriteau v. W. D. Morris Realty Ltd.*, [1943] O.R. 724.

⁹ *Mulliner v. Florence* (1878), 3 Q.B.D. 484.

¹⁰ R.S.O. 1970, c. 267.

¹¹ 41 Vict., c. 17.

¹² *Royal A. Vaillancourt Company Limited v. Trans Canada Credit Corporation Limited* (1963), 37 D.L.R. (2d) 450 at 453 (Ont. C.A.).

the common law rules as to the creation of the lien are still applicable; the right to sell exists only while the lien exists and, as was indicated earlier, the lien essentially is a possessory one.

2. PERSONS ENTITLED TO THE LIEN

As we have seen, the right to a lien is not restricted to the repairman of one particular type of chattel, but extends to anyone who for reward alters or improves a chattel for another, and the reported cases deal with liens arising in a wide variety of trades.¹³ In addition, the power of sale conferred by section 48 of *The Mechanics' Lien Act* extends to all persons who are entitled to claim a lien.

3. RIGHTS OF THE LIENHOLDER AS AGAINST THIRD PARTIES

The question arises as to the rights of the lien claimant where the chattels upon which he has performed his services are subject to a prior security interest such as a chattel mortgage or a conditional sale agreement. The case law in Ontario is clear that when an artisan has repaired, added to or improved an article in the legal possession of a purchaser under a conditional sale contract or of a chattel mortgagor, the purchaser or mortgagor in possession of the article has the implied authority of the owner to authorize the work and thereby subject the article to the lien of the artisan.¹⁴ This would appear to be so even though the security agreement contains a stipulation that the conditional purchaser or mortgagor will keep the chattel free of the liens and encumbrances,¹⁵ the reason being that the artisan's lien is an incident of the contract to repair and arises by operation of law and thus is different from a security interest such as a chattel mortgage that arises through deliberate action by the person in possession.¹⁶ This result would appear to us to be a sensible one,

¹³ Repairs to an automobile: *Commercial Finance Corporation v. Stratford* (1920), 47 O.L.R. 392; repairs to a vessel: *Hackett v. Coghill* (1903), 2 O.W.R. 1077; work done on furniture: *Hayward v. G.T.R. Co.* (1872), 32 U.C.Q.B. 392; services performed upon a horse: *McBride v. Bailey* (1857), 6 U.C.C.P. 523.

¹⁴ *Royal A. Vaillancourt Company Limited v. Trans Canada Credit Corporation Limited* (1963), 37 D.L.R. (2d) 450 (Ont. C.A.)

¹⁵ *Commercial Finance Corporation v. Stratford* (1920), 47 O.L.R. 392. It may be noted that it is common for a conditional sale agreement to contain a covenant to keep the chattel in good repair and also to keep it free of liens and encumbrances.

¹⁶ Courts in other jurisdictions have not always recognized the artisan's lien as against third parties. See, for example, *Alliance Finance Company and Standard Motors Limited v. Simons*, [1928] 3 W.W.R. 621 (B.C. C.A.), where the repairman was held to have no lien in the face of a conditional sale agreement which stated that the conditional purchaser should not permit any charge or lien, whether possessory or otherwise, to exist against the automobile. (But see, *contra*, a decision of the British Columbia Supreme Court, *General Securities Ltd. v. Brett's Ltd.* (1956), 19 W.W.R. 385). Similarly, the Australian courts seem to give weight to a clause in a conditional sale or chattel mortgage agreement not to create a lien. See *Fisher v. Automobile Finance Company of Australia Limited* (1928), 41 C.L.R. 167. For a discussion of these and other cases, see the comment by Daniels in (1957), 35 Can. Bar Rev. 96.

as it would seem to be onerous to require a repairman, who may often be running a very small business, to carry out a search for, and ascertain the terms of, any security interest affecting chattels before he starts to work on those chattels. This point will be examined in greater detail later.

Reference must also be made to *The Personal Property Security Act*,¹⁷ which will shortly govern most security interests in Ontario; while the Act does not apply in general to liens given by statute or rule of law,¹⁸ it does have something to say with respect to priorities between liens on the one hand and interests secured under *The Personal Property Security Act* on the other.¹⁹ Section 32 reads as follows:

32. Where a person in the ordinary course of business furnishes materials or services with respect to goods in his possession that are subject to a security interest, any lien that he has in respect to such materials or services has priority over a perfected security interest unless the lien is given by an Act that does not provide that the lien has such priority.

Two comments may be made with regard to this section of *The Personal Property Security Act*. In the first place, it refers to goods in the possession of the lien claimant, so it is arguable (but not entirely clear) that it applies only to the possessory lien and would not apply to a non-possessory lien if legislation providing for such a lien were enacted.²⁰ Secondly, with regard to liens created by statute, section 32 seems to vary somewhat the presumption set out in Article 9 of the Uniform Commercial Code,²¹ which was the model upon which *The Personal Property Security Act* was based. Article 9 states that a lien has priority over a perfected security interest unless the lien is statutory and the statute provides that the lien has no such priority, whereas section 32 states that a lien has priority unless the lien is created by a statute that does not provide for such priority. In other words, if the statute creating the lien is silent as to priorities, the lien takes priority over a perfected security interest under Article 9, whereas under section 32 the lien ranks behind the perfected security interest.²² However, if the proposition stated earlier is

¹⁷ R.S.O. 1970, c. 344.

¹⁸ Section 3(1)(a).

¹⁹ At this time, only the registration provisions of *The Personal Property Security Act* are in effect; the substantive parts of the Act, such as the priorities sections, are not expected to be proclaimed into force until 1973 or 1974.

²⁰ For a discussion of the possible implications of the slightly different possessory language in section 9-310 of the Uniform Commercial Code, see Gilmore, *Security Interests in Personal Property*, Volume 2 (Little, Brown and Co., 1965) at 887 ff.

²¹ Section 9-310.

²² The *Uniform Personal Property Security Act* proposed by the Conference of Commissioners on Uniformity of Legislation in Canada changes the language of section 32 to conform with the language of Article 9 in this respect. See *Proceedings of the Fifty-Third Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1971), at 78, 196. The *Uniform Act* also contains an additional subsection, subsec-

accepted, namely that the possessory lien in Ontario is created by the common law and not by statute, then the priority of the possessory lien is preserved over all perfected security interests.

4. DEFICIENCIES IN THE PRESENT LAW

Our main concern in this report is with the deficiencies in the present law flowing from the fact that the lien is possessory, although we shall also make some recommendations concerning the power of sale at present given to the possessory lienholder by section 48 of *The Mechanics' Lien Act*. The fact that the lien is lost if possession of the chattel is surrendered results in a situation that is often unsatisfactory both from the point of view of the repairman and of the owner of the chattel. If the repairman, for one reason or another, is unwilling or unable to extend credit to the person whose chattel he has repaired, (a not unusual situation where he is running a small business), he is compelled to hold on to the chattel if he wishes to preserve his lien, with the following results:

- (i) Storage costs are incurred on the part of the repairman, especially in the case of large chattels such as motor vehicles; such costs cannot be included as part of his claim for a lien, on the theory that the retention of the chattel is for the benefit of the repairman and not the owner of the chattel. Nevertheless, the repairman is put to some disadvantage where space is at a premium and the chattel to be stored is large, and in some cases repairmen such as garagemen surrender possession of the chattel in the hope of being paid eventually, but, upon remaining unpaid, are often not able to give up the time required to enforce their claim through the courts.
- (ii) The owner of the chattel may be inconvenienced as he is deprived of the possession and use of the chattel so long as it is in the repairman's hands. Where the chattel is used for the purpose of earning a living, such as may be the case, for example, with a motor vehicle or a farm vehicle, the inconvenience to the owner may amount to severe hardship, which is compounded if the chattel must be used to earn the money

tion (2) of section 32, the marginal note to which reads "Priority of non-possessory liens", and which provides as follows:

32.—(2) Where a person in the ordinary course of business furnishes materials or services with respect to goods not in his possession that are subject to a security interest, any lien that he has under any Act in respect of the materials or services has such priority over a perfected security interest as is given by that Act.

It is not entirely clear from a cursory reading of the language of section 32(2) whether the subsection is referring to the situation where the goods were not in the repairman's possession (i.e. at his place of business?) when the materials or services were furnished, or whether it is referring to the situation where the goods were in his possession but were subsequently released to the owner. The marginal note to the subsection suggests that the latter interpretation is intended.

needed to pay the repairman and cannot be so used because the repairman wishes to preserve his lien.

Thus the present law, with its emphasis on possession, often results in great inconvenience both to the repairman and to the owner of the chattel. The unsatisfactory results of the present law are emphasized all the more when it is realized that in many cases, especially in the case of expensive chattels, the amount of the debt secured by the lien is low in relation to the value of the chattel, or, to put the matter another way, the security is disproportionate to the debt. There are clearly situations where it is desirable, in the view of the Commission, that the repairman be allowed to preserve his lien while delivering up possession of the chattel.

In some instances, attempts are made by repairmen such as automobile repairmen to preserve their lien by contract; the vehicle is surrendered and a memorandum is placed upon a cheque given in payment for the repairs, to the effect that in consideration of the surrender of possession of the vehicle, the garage retains its right to repossess the vehicle should the cheque not be honoured by the bank. Such a contract is not registerable, however, and the position of the repairman would appear to be most precarious as against, for example, a person to whom the owner of the chattel gives a chattel mortgage immediately after having the repairs carried out, as far as the question of priorities is concerned. Such a situation is far from satisfactory and we are of the view that it should be clarified through the provision of a non-possessory lien as part of a legislative framework establishing a clear system of priorities between the lien claimant and other persons claiming an interest in the same chattel. The deficiencies of the possessory lien are not of equal magnitude in respect to all chattels, however, and the question as to what types of chattels should be made subject to the non-possessory lien will be examined in a later chapter, although we note at this point that in 1955 a Select Committee of the Ontario Legislature recommended that a garageman should be able to release a vehicle from his possession and retain his lien, subject to his fulfilling certain conditions.²³

²³ *Report to the Ontario Legislature of the Select Committee on Central Registration of Documents of Title and Pledge Respecting Chattels and Certificates of Title of Ownership of Motor Vehicles*, 1955, at 13-14. The Report also recommended that legislation in relation to garages should be amended to permit a garageman a lien for storage upon a motor vehicle left with him for repair or servicing where the owner does not claim it within ten days after invoicing of the vehicle to the owner when it is ready for delivery.

CHAPTER II

THE LAW IN OTHER JURISDICTIONS

The Commission has examined the law in several jurisdictions other than Ontario, with a view towards ascertaining to what extent, if any, provision is made in the legislation of those jurisdictions for a non-possessory repairman's lien. What follows is a summary of our examination.

1. THE UNITED KINGDOM

In England, the artisan or mechanic who has performed work upon chattels is in a less favourable position than his counterpart in Ontario, as his power of sale is severely limited. He has, of course, the right to remain in possession of the chattels until he is paid, but the right to sell the chattels, which arises under the *Disposal of Uncollected Goods Act*,²⁴ arises in such limited circumstances and subject to such detailed and stringent conditions that the right is of little value.²⁵ There is also a discretion in the High Court to order a sale.²⁶ In summary, the repairman or artisan in England would appear to have less protection than the repairman or artisan has under present Ontario law.

2. THE UNITED STATES

In the United States, most of the artisans' or repairmen's liens are possessory; that is, the statutes which govern such liens do not change the common law rule, except to add a power of sale.²⁷ A few important exceptions may be noted; there are a few lien statutes which allow the lien claimant to preserve his lien (in some cases in respect of the repair of any kind of chattel) by filing after he gives up possession of the chattel,²⁸ but such statutes appear to be fairly uncommon. As a further

²⁴ 15 and 16 Geo. VI and 1 Eliz. II, c. 43 (1952).

²⁵ The right of the repairman to sell, for example, only arises when the bailor fails both to pay for the repairs and to take delivery. In addition, the requirements as to notice, such as notice in the prescribed form that the goods are ready for delivery, and notice in the prescribed form of intention to sell, are quite onerous.

²⁶ Rules Sup. Ct., O. 29, r. 4.

²⁷ See Gilmore, *Security Interests in Personal Property*, Volume 2 (Little Brown and Co., 1965) at 873 ff.

²⁸ See, for example, Ind. Stats. s. 43-802 (Burns, 1933); Kan. Gen. Stats. s. 58-201 (1949); Maine Rev. Stats. c. 178, s. 62 (1954); Ill. Ann. Stats. c. 82, s. 40 ff. (Smith-Hurd, 1966). The Illinois legislation, for example, provides for a non-possessory lien in the hands of every person who has repaired or stored any chattel, to be preserved by means of a filing system; the legislation also makes reference to priorities and provides, in a rather

variation, in at least one state the lien statute provides that if possession is lost, the re-acquiring of possession will allow the repairman to assert his original lien.²⁹ In general, however, as far as we were able to ascertain, although there are numerous differences in detail, the legislation in the majority of the states is fairly similar to the present law in Ontario, at least to the extent that the lien conferred or recognized in the relevant statute is a possessory one.

3. OTHER CANADIAN PROVINCES

In Canada, the Provinces of British Columbia, Alberta, Saskatchewan and Manitoba have enacted legislation³⁰ to provide for the preservation of a lien in certain cases after loss of possession of the chattel by the lienholder. This is accomplished by means of a registration system. In British Columbia, the relevant legislation appears at the end of the *Mechanics' Lien Act*, following a section of that Act similar to section 48 of the present Ontario statute which recognizes the possessory lien in the hands of any repairman and confers a power of sale;³¹ in the other provinces, the legislation appears in the form of separate statutes dealing with garagemen or garage keepers, and which, in the case of Manitoba and Saskatchewan, also confer a possessory lien on the garage keeper.

To summarize briefly, the legislation in the provinces referred to provides that if a garageman or garage keeper (as defined in the legislation) obtains an acknowledgment of indebtedness before surrendering possession of a vehicle covered by the legislation, he does not lose his lien by surrendering possession if he files or registers within a certain stated time at a certain stated place an affidavit of lien or claim of lien supported by an affidavit, and pays a filing fee. The lien remains in effect for a certain stated period of time, during which time the lien claimant may

complex and exceedingly lengthy provision, for foreclosure by advertisement and sale or by suit in chancery.

²⁹ District of Columbia Code Encyclopedia (West, 1968), s. 38-205

³⁰ The *Mechanics' Lien Act* R.S.B.C. 1960, c. 238 as amended by S.B.C. 1965, c. 24, S.B.C. 1969, c. 35, S.B.C. 1970, c. 44; *The Garagemen's Lien Act*, R.S.A. 1970, c. 155, as amended by S.A. 1971, c. 33, S.A. 1971, c. 39; *The Garage Keepers Act* S.S. 1970, c. 25; *The Garage Keepers Act* R.S.M. 1970, c. G. 10 as amended by S.M. 1970, c. 8. Relevant parts of the statutes are reproduced in the Appendices to this report.

³¹ It may be noted that in Alberta there is a statute dealing with possessory liens in general, entitled *The Possessory Liens Act*, R.S.A. 1970, c. 279. The Act provides (s. 3) that a person has a particular lien for the payment of his debt upon a chattel upon which he has expended his money, labour or skill at the request of the owner thereof and thereby enhanced its value. A bailee is also given a lien for charges due under the terms of the contract of bailment or for his reasonable charges (s. 5). Actual or constructive and continued possession is essential to the existence of the lien (s. 6). The statute also provides (s. 9) that a person entitled to a lien upon a motor vehicle may include in the debt covered by the lien an amount for reasonable charges for storage during the period of detention. The goods may be sold pursuant to leave of the court (s. 10), and provision is made for the distribution of the proceeds of sale (s. 12).

assert his rights under the lien, namely, seizure and sale of the chattel. The kinds of chattels covered by the statutes vary, as do the relevant time periods and places of filing. The statutes also establish systems of priorities between lien claimants and persons claiming different security interests in the same chattel which, again, are not identical.

The Commission examined and compared the legislation under the following headings:

(i) *Date of the original enactment providing for a non-possessory lien*

British Columbia	1939 ³²
Alberta	1937 ³³
Saskatchewan	1940 ³⁴
Manitoba	1958 ³⁵

Prior to the dates referred to above, the legislation made reference only to the possessory lien.

(ii) *Chattels covered by the non-possessory lien*

The statutes originally applied to motor vehicles (self-propelled vehicles) and were later extended to aircraft. The only exception is Manitoba's legislation, which originally applied to farm vehicles only, and was later extended to include motor vehicles in general.³⁶ The following comments were made by a court, referring to the Alberta legislation, as to the special treatment afforded repairmen of motor vehicles as opposed to other repairmen or artisans:³⁷

The motor vehicle has become a machine of special significance in every segment of modern society. It is identified with industrial progress and better standards of living. I can conceive that

³² S.B.C. 1939, c. 32.

³³ S.A. 1937, c. 77.

³⁴ S.S. 1940, c. 99.

³⁵ S.M. 1958, c. 15.

³⁶ In the Alberta and Saskatchewan legislation, "motor vehicle" means a vehicle propelled by any power other than muscular power and includes an aeroplane but does not include a motor vehicle that runs only on tracks or rails. Prior to 1971, the definition of "motor vehicle" in Alberta expressly excluded a tractor used for agricultural purposes, but this exclusion was dropped in 1971. (S.A. 1971, c. 33).

In the British Columbia legislation, "motor vehicle" is defined as having the same meaning as in the *Motor-vehicle Act* (R.S.B.C. 1960, c. 253), where it is defined as a vehicle, not run upon rails, that is designed to be self-propelled or propelled by electric power.

In the Manitoba legislation, "motor vehicle" includes an automobile, motor bicycle, tractor, and any other vehicle propelled or driven otherwise than by muscular power, and any internal combustion engine, but does not include a car of an electric or steam railway, or any other vehicle running only upon rails, or a trolley bus. "Farm vehicle" is defined separately.

³⁷ *R. Angus Alberta Limited v. Union Tractor Limited* (1967), 61 W.W.R. 603 (Dist. Ct.) at 609-610.

it could be harmful or impractical in many cases to hold a machine required in industry, or by a person in his trade or calling, for the security of a possessory lien, but until an alternative was provided the garageman had no other means of security. In any event I believe that it was recognized that the motor vehicle was a special chattel which created a special problem and the Legislature therefore saw fit to pass legislation confined to motor vehicles to give the garageman a new kind of lien which would enable him to surrender possession.

The lien is for the sum due to a garageman who is entitled to payment for the storage, repair or maintenance of a motor vehicle (Alberta), or for the indebtedness incurred as a result of the bestowing of money or skill or materials upon a motor vehicle (British Columbia) or for "service" or "services", defined essentially as *bona fide* repairs to a vehicle by labour or by supplying parts thereof or accessories thereto, (Saskatchewan and Manitoba, the legislation in the latter province also defining "service" to include the painting, storing or caring for a vehicle).

(iii) *Acknowledgment of indebtedness*

The statutes require the garageman or garage keeper to obtain an acknowledgment of indebtedness before he surrenders possession of the vehicle, by having the person who has requested the repairs sign an invoice or other statement of account respecting the services performed.

(iv) *Time given to file affidavit or claim of lien*

The statutes provide that if the affidavit or claim of lien is not filed or registered within a certain number of days after surrender of possession of the vehicle, the lien ceases to exist. The applicable time periods are as follows:

British Columbia	15 days (formerly 10 days)
Alberta	21 days
Saskatchewan	45 days (formerly 30 days)
Manitoba	20 days (formerly 10 days)

(v) *Place where affidavit or claim of lien must be filed*

British Columbia	Registrar-General
Alberta	Registration Clerk of the Motor Vehicles Branch
Saskatchewan	Registration Clerk for the Province of Saskatchewan
Manitoba	Clerk of the County Court of Winnipeg

(vi) *Contents of affidavit or claim of lien*

The affidavit or claim of lien generally is required to contain the name and address of the garageman or garage keeper and of the person

against whom the lien is claimed, a description of the vehicle, a description of the services rendered, and a statement that the garage keeper claims a lien upon the vehicle in the amount stated. British Columbia and Alberta also require that a copy of the acknowledgment of indebtedness be attached.

(vii) *Length of lien*

The Acts provide that the lien continues for a certain time period after the date of filing or registration, after which time it ceases to exist unless in the meantime the vehicle has been seized. The time periods are as follows:

British Columbia	180 days
Alberta	6 months (subject to extension by a judge)
Saskatchewan	6 months (subject to extension by a judge)
Manitoba	8 months

(viii) *Seizure and sale*

The statutes basically provide that at any time while the lien is subsisting, a warrant may be issued by the garage keeper to a bailiff or sheriff directing him to seize the vehicle and return it to the garage keeper. The vehicle may then be sold, subject to certain requirements as to notice. There are also provisions governing the distribution of proceeds from the sale, ranging from the brief statement in the British Columbia legislation that after the garage keeper has been paid, the surplus (if any) shall be paid to the "person entitled thereto", to the detailed provisions as to the application of proceeds contained in section 15 of the Saskatchewan legislation.

(ix) *Priorities between lien claimants and other claimants*

The question of priorities between lien claimants and other persons claiming an interest in the chattel is an important one, and the scheme of priorities as set out in the legislation in force in the western provinces is not uniform.

The legislation in British Columbia, Alberta and Manitoba provides that where any charge on or claim to a vehicle is created or arises³⁸ after a garage keeper has surrendered possession and before the affidavit of lien has been filed, that charge or claim, if created in good faith and without express notice of the lien of the garage keeper, has priority over the lien. In other words, once the garage keeper has surrendered possession of the vehicle, priority of registration would appear to prevail. The British Columbia legislation has nothing else to say on the question of priorities, but the legislation in Alberta and Manitoba also provides that as between two or more lien claimants under the Act, (that is, two or more garage keepers), priority of registration prevails in general. The Manitoba legisla-

³⁸ The British Columbia legislation says "created and registered".

tion also provides that while the vehicle is in the garage keeper's possession after the service has been performed, the lien has priority over, and is not subject to, any charge or encumbrance in respect of the vehicle except a claim registered under the Act.

While the legislation in Saskatchewan was formerly similar to that in the other three provinces, it was changed in 1970 to provide for a different system of priorities.³⁹ It now provides⁴⁰ that every lien upon a vehicle under the Act shall have priority over the interest of a vendor under a conditional sale agreement or of a mortgagee under a chattel mortgage whether or not such interest was created before or after the creation of the lien claimed under the Act. However, the lien is postponed to the interest of a purchaser for value who purchases in good faith, without express notice of the lien, when the vehicle is out of the possession of the garage keeper and before the latter has filed his claim of lien. In other words, the need to file or register a claim quickly from the garage keeper's point of view only arises to preserve his priority over a subsequent purchaser but not against a subsequent chattel mortgagee. To compare this legislation with that in the other three provinces, if the garage keeper has surrendered possession of the vehicle to the owner, who then gives a chattel mortgage to a third party which is registered before the garage keeper's claim is registered, the chattel mortgagee in British Columbia, Alberta, and Manitoba will have priority over the garage keeper, but in Saskatchewan the garage keeper will have priority so long as he files within 45 days of the surrender of possession of the vehicle, regardless of when the chattel mortgagee files.⁴¹

4. SUMMARY

It is clear from the preceding survey that there is ample legislative precedent in other jurisdictions for the conferring of a non-possessory repairman's lien, at least with respect to the repair of certain chattels. While the non-possessory repairman's lien does not exist in England, it does exist in some states of the United States (where, in at least one or two states, it extends to the repair of any type of chattel), and in the

³⁹ S.S. 1970, c. 25.

⁴⁰ Section 7.

⁴¹ There are not many reported cases involving the question of priorities as set out in the legislation in force in the western provinces. One case that did deal with the question was *R. Angus Alberta Limited v. Union Tractor Limited* (1967), 61 W.W.R. 603 (Dist. Ct.), which was concerned with the Alberta legislation. Plaintiff was the vendor of a tractor under a duly registered conditional sale contract. Defendant performed repairs on the tractor and filed a claim of lien, and the question arose as to the priority between the defendant and the plaintiff. It was held that since the conditional sale contract had been registered before the repairs had been performed, there was nothing in the Act to oust the common law rule as to a lien claimant's priority over a prior conditional vendor. There was no reason why a non-possessory lienholder should be any worse off than a possessory lienholder; the Act only gave priority to charges arising after the lien arose, and even then only in certain circumstances.

western provinces of Canada. The legislation in the various jurisdictions conferring a non-possessory lien contains many similarities, but there are also some differences concerning such questions as the form of the legislation, the types of chattels covered, priorities, and the procedure upon realization of the security. The consideration of such questions in the context of the existing Ontario legislative framework and of any new legislation to be enacted in Ontario will be the subject of the following chapter of this report.

CHAPTER III

PROVIDING FOR A NON-POSSESSORY LIEN IN ONTARIO

Having examined the present state of the law in Ontario on the repairman's lien and having concluded that a change in the law is warranted, we turn in this chapter to a consideration of some preliminary matters that must be examined if provision is to be made for a non-possessory lien, and of the form and content of the legislation necessary to provide for the lien. Specifically, the Commission addressed itself to the following questions:

1. Should *The Personal Property Security Act* be amended so that the entire legislative framework required to govern the lien is contained in that statute, or should the Act be limited to a reference to priorities? If *The Personal Property Security Act* is to be limited to a reference to priorities, what, if any, should be the role of *The Mechanics' Lien Act* with respect to the repairman's lien?
2. What types of chattels should be covered by the non-possessory lien?
3. What kinds of rules should be set up to govern the creation of the non-possessory lien, the relationship of the non-possessory lienholder to other persons claiming an interest in the same chattel, and the realization of the security by the lienholder?

1. THE PERSONAL PROPERTY SECURITY ACT

Both *The Personal Property Security Act* and Article 9 of the Uniform Commercial Code apply in general to transactions that create security interests, but are expressly made not to apply, *inter alia*, to liens created by statute or rule of law, except for a brief statement as to priorities between lien claimants and other parties claiming a security interest in the same chattel. The reason for the exclusion of liens was that the legislation was intended to cover only "consensual" security interests, that is, interests created directly by commercial contract and not arising as the by-product of the breach of some other contract. As one of the commentators on Article 9 has written:⁴²

. . . the dividing line sought to be drawn seems reasonably clear. In all states people such as warehousemen, carriers, garagemen, hotel keepers and many others are given, either by statute or by the

⁴² Gilmore, *Security Interests in Personal Property*, vol. 1 at 306.

common law, liens for their services against property entrusted to them by the owners. These liens arise out of a contractual situation (the contract for services), but it is fair to say that they are not 'created by contract'; the lien, or the right to the lien, arises as a sort of accidental by-product of the failure of the owner of the property to pay for the services (or materials) which have been furnished. Not only do liens of this type have little or nothing to do with the types of commercial financing with which Article 9 is concerned, but the list of such liens from state to state is marked by an extraordinary amount of local diversity.

The distinction between consensual and non-consensual security interests has been criticized on several grounds, one of which being that a lien arising by operation of law is really a consensual interest since the law presumably reflects some sort of "consent" arising out of usage and practice in the community.⁴³ In response to this it may be said that even if it is accurate to characterize the law as reflecting "consent" in a community, such consent is so far removed from the consent of the sort that is a part of the ordinary commercial contract as to justify the distinction. The lien is really usually incidental to the contract to repair, in contrast to a security interest arising, for example, under a chattel mortgage agreement, where the giving of the chattel mortgage is often a fundamental and necessary part of the commercial contract. Secondly, the distinction is criticized as perpetrating the very heresy that the legislation was designed to avoid, namely the existence of differences based on form rather than on reality.⁴⁴ Even if it is conceded that the distinction is only one of form, it should be noted that *The Personal Property Security Act* and Article 9 of the Uniform Commercial Code have in fact accomplished a great deal by eliminating many differences which were hitherto based on form, and there is the danger that if too much is expected of *The Personal Property Security Act* it may become so cumbersome as to be unworkable. The Act is already a complex statute, and it would be rendered more unwieldy, if not more complex, if special provisions were added governing the creation of a lien, possessory or otherwise, the types of chattels covered by the non-possessory lien, time periods and other requirements with respect to filing, the length of the lien, and provisions as to seizure and sale. In addition, if *The Personal Property Security Act* were made to govern the lien in detail, there would be no logical reason for not including the creation and regulation of other liens created by law in Ontario, such as the unpaid seller's lien,⁴⁵ the warehouseman's lien,⁴⁶ the innkeeper's

⁴³ See Miller, "Liens Created by Operation of Law: A Look at Section 9-310 of the Uniform Commercial Code" (1971), 76 *Commercial Law Journal* 221.

⁴⁴ See Goode and Gower, "Is Article 9 of the Uniform Commercial Code Exportable? An English Reaction", in Ziegel, (ed.), *Aspects of Comparative Commercial Law* (McGill University, 1969) at 326-327.

⁴⁵ *The Sale of Goods Act*, R.S.O. 1970, c. 421.

⁴⁶ *The Warehousemen's Lien Act*, R.S.O. 1970, c. 488.

lien,⁴⁷ and the woodman's lien,⁴⁸ each of which requires special treatment. The Commission is of the opinion that *The Personal Property Security Act*, for the reasons discussed, is not the appropriate statute under which the non-possessory lien should be created and governed, and that the Act should be restricted to a general reference to priorities.

In view of the fact that *The Mechanics' Lien Act* already contains a reference to the repairman's possessory lien in section 48, the Commission gave consideration to the question as to whether the non-possessory lien should be governed under that statute, following section 48 thereof. We have concluded that since the main concern of *The Mechanics' Lien Act* is with a lien attaching to land as a result of work being done or materials being furnished in the course of building construction, section 48 of that Act appearing almost as an afterthought, both section 48 of *The Mechanics' Lien Act* and any provisions dealing with a non-possessory lien should preferably be contained in a new statute. Liens in the hands of repairmen of chattels are essentially a separate subject from liens in favour of people engaged in building construction, and we are of the opinion that, as such, they are better governed by a separate Act.

We therefore recommend that section 48 of *The Mechanics' Lien Act* be repealed and that a new statute be enacted, a suggested title of which would be "The Repairman's Lien Act", the first part of which would contain provisions comparable to those contained in section 48 (subject to changes to be discussed below) recognizing the common law possessory lien in the hands of a repairman of any chattel and conferring a power of sale, and the second part of which would contain the provisions necessary to create a non-possessory lien and which will be discussed later in this chapter.

As noted above, the first part of the proposed statute would be concerned with the possessory lien, and would contain a provision similar to that contained in section 48, conferring a power of sale by auction upon any person who has bestowed money, skill or materials upon a chattel or thing in the alteration or improvement of its properties or for the purpose of imparting an additional value to it, so as thereby to be entitled to a lien upon the chattel or thing for the amount or value of the money or skill or material bestowed. The power of sale, which would be in addition to any other remedy to which the person claiming the lien would be entitled, would be exercisable only while the lien existed and only if the amount to which he was entitled remained unpaid for three months after it ought to have been paid.^{48a}

We wish to make some comments with respect to the notice provisions contained in section 48 of *The Mechanics' Lien Act*, which make

⁴⁷ *The Innkeeper's Act*, R.S.O. 1970, c. 223.

⁴⁸ *The Woodmen's Lien for Wages Act*, R.S.O. 1970, c. 504.

^{48a} Reference should be made to *The Unclaimed Articles Act*, R.S.O. 1970, c. 471, some of the provisions of which may require modification if the recommendations contained in this report are implemented.

reference to advertisement in a newspaper in the municipality where the work was done. One of the purposes of such advertisement is to give notice of the sale to persons having an interest in the chattel so that they can assert a claim against the proceeds. There is no guarantee that the advertisement will come to the attention of such persons, especially where the repairs are carried out in one part of the province and the secured parties are in another, but before the enactment of *The Personal Property Security Act* no other method of notice was really possible as it was extremely difficult to ascertain the existence of all the persons holding security interests in the chattel. However, with *The Personal Property Security Act* and the central registration system established thereunder, it will become a relatively simple procedure to search for security interests against chattels, and we recommend that a person desiring to sell the chattel pursuant to his possessory lien should be required to give written notice (served personally upon or left at the residence or last known place of abode of the party to be served or sent by registered mail to his last known post office address) to any person who has a security interest in the chattel under *The Personal Property Security Act*, and who has registered a security agreement under that Act. In addition he should be required to give written notice to a person who has registered a claim for a non-possessory lien pursuant to the second part of "The Repairman's Lien Act". Section 48 of *The Mechanics' Lien Act* provides that notice be given to the "owner" if he is a resident of the municipality in which the work was done; it is not clear whether by the word "owner" is meant the person who requested the repairs (i.e. the debtor) or the legal owner, who may be different persons if, for example, the chattel was previously sold pursuant to a conditional sale contract. In any event, we recommend that notice in the manner suggested above be given to the person who requested the bestowing of the money, skill or materials upon the chattel or thing, regardless of whether or not he is a resident of the municipality where the work was done.

In order to provide the closest possible uniformity with the provisions of *The Personal Property Security Act* dealing with the disposition of collateral by a secured party under that Act,⁴⁹ we recommend that the period of notice required when a chattel is sold pursuant to a possessory lien be fifteen days, and that the notice contain the name of the person indebted, a brief description of the chattel or thing to be sold, the amount of the debt, a statement that upon payment of the amount due the chattel may be redeemed, a statement that unless the amount due is paid the chattel will be disposed of and the debtor may be liable for any deficiency, and the date, place and time of the auction.

As to the question of the disposition of the proceeds of a sale pursuant to a possessory lien, we recommend that the proceeds of the sale be applied consecutively in payment of:

⁴⁹ Section 58(5).

- (i) the costs of the sale,
- (ii) the claim, if any, of a person who has registered a prior claim of lien under “The Repairman’s Lien Act” (i.e. a non-possessory lien), upon application being made in writing within a certain stated period of the sale,
- (iii) the amount due to the person claiming a possessory lien, and
- (iv) the claim, if any, of a person who has a security interest in the chattel under *The Personal Property Security Act* and who has registered a security agreement under that Act, upon application being made as in (ii),

and that the surplus, if any, be paid to the debtor or other person entitled thereto.

Finally, we recommend that the first part of “The Repairman’s Lien Act” contain a provision to the effect that the lien of a person who has bestowed money, skill or materials upon any chattel or thing in the alteration or improvement of its properties or for the purpose of imparting an additional value to it should, if created in good faith, and so long as the chattel or thing is in the possession of the person claiming the lien, have priority over an existing security interest perfected under *The Personal Property Security Act*.⁵⁰ As was seen in the discussion concerning section 32 of *The Personal Property Security Act*, that section provides for the priority of the repairman’s possessory lien over a perfected security interest where the lien is given at common law (as would continue to be the case under “The Repairman’s Lien Act” if the initial wording of section 48 of *The Mechanics’ Lien Act* is followed) without a further statement needed as to priority. We suggest that although strictly speaking it is not necessary to provide for such priority in the statute, the priority of the possessory lien is thereby emphasized.⁵¹ The reference to the requirement of good faith is merely to stress that the priority of the possessory lien should not extend to situations where, for example, the amount claimed by the repairman is clearly exorbitant, or where a dishonest debtor enters into collusion with the repairman to run up a bill which, if it takes priority, will leave the holder of the prior security interest with no security and only a judgment-proof debtor to pursue. It is, of course, possible that the words “in the ordinary course of business” contained in section 32 of *The Personal Property Security Act* were intended to provide for such situations. We also recommend that the

⁵⁰ The priority of the possessory lien already exists, as we have seen, under present Ontario case law. *Supra*, at 9 *et seq.*

⁵¹ If, rather than merely recognizing the common law possessory lien, the proposed statute were to attempt to create a possessory lien, then a statement of the priority of the possessory lien would not be merely superfluous and for emphasis but would be absolutely necessary if the priority of the lien created by the statute is to be preserved, in view of the somewhat peculiar wording of section 32 of *The Personal Property Security Act*. *Supra*, at 10, 11.

legislation provide that the possessory lien should be subject to a claim of lien which has previously been registered under "The Repairman's Lien Act", (i.e. a non-possessory lien), if any. The question of priorities will be examined in greater detail later in the chapter.

2. TYPES OF CHATTELS TO BE COVERED BY THE NON-POSSESSORY LIEN

As suggested previously, the second part of the new statute would provide for a non-possessory lien, and the next question to be examined concerns the types of chattels which should be covered by the lien. There would appear to be no reason in principle why a non-possessory lien could not be conferred in every case where a person has improved or repaired a chattel of another person, whether that chattel be an automobile, an appliance, a stereophonic receiver, a watch or a pair of shoes. The legal issues to be resolved are essentially the same, regardless of what types of chattels are made subject to the non-possessory lien. The real question, however, is whether the same considerations are applicable with respect to different chattels, or, to put the matter another way, whether the limitations and inadequacies of the possessory lien are equally applicable in the case of all chattels. We have already noted that the legislation in the western provinces is restricted to certain chattels.

The Commission is of the opinion that the following factors should be taken into account in attempting to decide what types of chattels should be made subject to the non-possessory lien:

(i) *Size of the Chattel.* The larger the chattel, the greater the cost to the repairman who is forced to rely on the possessory lien, as his storage costs increase with the size of the chattel. The storage costs of a jeweller who is forced to retain possession of a watch are negligible compared to the storage costs incurred, for example, in the case of a repairman of motor vehicles. In the case of large chattels, there is often also the problem of simply finding the necessary storage space.⁵²

(ii) *Importance of the Chattel.* The more important the chattel, the greater the inconvenience to the owner of the chattel resulting from the retention of the chattel by the repairman. To some extent, of course, "importance" is a relative term, depending on the individual; nevertheless there are some chattels, such as automobiles or farm vehicles, which are often required for purposes of earning a living and which are thus undeniably more important than other chattels. Furthermore, it may well be possible that the chattel may be needed to earn the money necessary to pay for the repairs, so that an unfortunate impasse is created if the repairman retains possession of the chattel.

(iii) *Value of the Chattel.* In certain cases, it is clearly not necessary to provide for a non-possessory lien, because of the low value both of the

⁵² The Garage Operators Association of Ontario, in a brief submitted to the Commission, has indicated, for example, that the problem of providing storage space for vehicles frequently is a difficult matter for a garage operator.

chattel and of the repairs performed upon that chattel. The consideration normally involved in the repair of a pair of shoes, for example, would surely not necessitate the filing of a claim of lien, seizure and sale, and it would be clearly inappropriate to provide for a non-possessory lien in such a case.

(iv) *Frequency of Repair.* The more frequent the repairs required to a particular chattel, the more frequent will be the reliance on the possessory lien, and the more obvious become the shortcomings of the possessory lien. The automobile, for example, is a chattel that is probably subject to repair to a greater degree than many other chattels, as a result both of its extensive use and of the large number of accidents that occur today. The automobile repairman is frequently in a difficult position, especially where insurance companies are involved; before the insurance companies proceed to deal with the various claims arising out of an automobile accident, the repairman will have completed the repairs and be awaiting payment. He may not be able to look to the insurance company for payment because he has no contractual relations with it, and the owner of the vehicle will be reluctant to pay the repairman before his own insurer has agreed to pay him. The repairman will thus be forced to retain possession of the vehicle in a large number of cases, especially where he has had no prior business dealings with the person who has requested the repairs.

After due consideration, we have come to the conclusion that the non-possessory lien should be broad enough to cover the repair of automobiles, trucks, farm tractors, snowmobiles, other types of motor vehicles, and aircraft.⁵³ All are large, expensive chattels whose importance cannot be denied and all are subject to a high frequency of repair. It is with respect to these chattels that the deficiencies of the possessory lien are at the present time most apparent, and we are of the view that it is not necessary at this time to provide for a non-possessory lien with respect to the repair of other chattels in view of the increased burden that would be imposed upon the registration system. This is not to deny that changing circumstances would not justify the addition of other chattels at some time in the future. The provision of a non-possessory lien with respect to the chattels mentioned would be of benefit both to the person who repairs those chattels and to the owner of the chattels; the former would be benefited in that he would be able to preserve his lien without the necessity of retaining the chattels and incurring the resulting inconvenience and expense, and the latter because he would not be deprived of the use of the chattel in order that the repairman may retain his lien. While it would still be open to the repairman to rely on the possessory lien if he so wished, it is anticipated in most instances he would not do so, since he

⁵³ Our recommendations include a broader class of chattels than was recommended by the 1955 Select Committee of the Ontario Legislature, referred to in footnote 23, which restricted its recommendations for a non-possessory lien to motor vehicles, somewhat more narrowly defined.

would have to store the chattel and would not be able to claim an amount for storage charges incurred during the period of detention, as will be discussed in a subsequent chapter of this report.

We therefore recommend, in answer to the question posed at the outset of this discussion, that the non-possessory lien extend to a garageman who has rendered services upon a vehicle in a garage, and suggest the following definitions for “garage”, “garageman”, “services”, and “vehicle”:

- (i) “Garage” means a building or part of a building within or in connection with which services are rendered upon a vehicle in the ordinary course of business;
- (ii) “Garageman” means an individual who, or a firm or corporation which, renders services upon a vehicle in a garage for or at a charge, price or consideration in the ordinary course of business as the principal employment or one of the principal employments of such individual, firm or corporation;
- (iii) “Services” means *bona fide* repairs to a vehicle by labour or by supplying parts thereof or accessories thereto, or the painting of a vehicle, but does not include the supplying of gas, oil or grease to a vehicle;
- (iv) “Vehicle” means a motor vehicle, commercial motor vehicle, trailer, farm tractor, self-propelled instrument of husbandry, road-building machine, motorized snow vehicle, and any vehicle propelled or driven by any kind of power other than muscular power and includes an aircraft, but does not include a vehicle that runs only on tracks or rails or a vessel used or designed to be used in navigation. The terms “motor vehicle”, “commercial motor vehicle”, “trailer”, “farm tractor”, “self-propelled implement of husbandry” and “road-building machine” shall have the same meaning as in *The Highway Traffic Act*, and the term “motorized snow vehicle” shall have the same meaning as in *The Motorized Snow Vehicles Act*.

3. THE NON-POSSESSORY REPAIRMAN’S LIEN—A PROPOSED LEGISLATIVE FRAMEWORK

Having examined the question as to what types of chattels should be covered by the non-possessory lien, we shall proceed with a consideration of what should be contained in the legislation necessary to provide for the lien. It is not our intention to propose detailed legislative provisions but rather to outline some of the points which in our view should be covered in the legislation. As indicated earlier, it is our recommendation that the provisions creating and governing the non-possessory lien be contained in the second part of the proposed new statute governing the possessory and the non-possessory lien.

(i) CREATION OF THE LIEN

The statute should provide that a garageman may surrender possession of a vehicle to the person at whose request he has performed services upon the vehicle without losing any lien that he may have with respect to the indebtedness acquired by him for the services (“garageman”, “vehicle”, and “services”, being defined in the manner suggested earlier), if, before surrendering possession, he obtains from such person or his agent an acknowledgment of indebtedness by requiring that person or the agent to sign an invoice or other statement of account. The signing of the invoice or statement of account should not, however, preclude the person who has requested the services from disputing in any subsequent proceedings the amount claimed by the garageman; the purpose of this proviso is to prevent the person who has authorized the repairs from being bound by his acknowledgment in situations where he may have signed the acknowledgment under pressure in order to obtain possession of the vehicle. Having the person who authorized the repairs sign the acknowledgment of indebtedness does, however, give that person notice of the amount to be claimed under the lien and involves him in some way in the creation of the lien, at least to the extent that a claim of lien cannot be registered for an amount greater than that which he has acknowledged.

The non-possessory lien should cease and determine unless the garageman registers a claim of lien within a certain period after the surrender of possession of the vehicle. Twenty-one days would appear to be a sufficient period of time within which the claim of lien should be registered. When *The Personal Property Security Act* is in full force and effect, affidavits will not be required in respect to documents registered under that Act. Since it is proposed that the registration system established under that Act be utilized for purposes of registration of the claim of lien (see below), it would follow that the claim of lien would not need to be supported by an affidavit, in contrast to the requirement of an affidavit contained in the legislation in the western provinces.

The claim of lien should state the name and address of the garageman and of the person against whom the lien is claimed, set forth a copy of the acknowledgment of indebtedness, give a description of the vehicle (licence number, if any; serial number, if any; make; model; style and year; registration letters, if any) and the services rendered, and state the amount claimed. The form of the claim of lien could be set out in a schedule to the Act.

The Commission has given consideration to the question of where the claim of lien should be registered. We have concluded that with the creation of a central registration system under which security interests created by *The Personal Property Security Act* will be registered, a convenient place is made available for the registration of the claim of lien, namely the registrar of personal property security, and the necessity of

setting up another central registration system is thereby obviated. Providing for a parallel registration system would only result in additional expense and yield no tangible advantages. Moreover, one of the benefits of using the system established by *The Personal Property Security Act* is that the determination of priorities between the lien claimant and other persons claiming a security interest in the same vehicle is facilitated if registration takes place under the same system. We recommend, therefore, that the claim of lien be registered with the registrar of personal property security, or with a branch registrar. The legislation should also make provision for the keeping of records by the registrar of personal property security, for the endorsing of claims with the time and date of receipt, and for the prescribing by regulation of the fees for registration, of any forms that may be necessary, or of any other matter necessary to carry out effectively the intent and purpose of the legislation.

The lien should continue for a period of six months from the date of registration unless within that period seizure of the vehicle is effected pursuant to the provisions of the statute relating to seizure. Provision should also be made for the registration of a discharge of lien if the amount due in respect of the lien is paid to the garageman.

Since the non-possessory lien will not be created and regulated by *The Personal Property Security Act*, the Assurance Fund established by that Act will not apply to the non-possessory lien, and in the view of the Commission it is desirable that the Assurance Fund not so apply.

(ii) PRIORITIES

The question of priorities between the non-possessory lien claimant and other persons claiming a security interest in the same chattel is one of the more difficult issues to resolve. It has already been seen that under existing case law, that is, even prior to the enactment of section 32 of *The Personal Property Security Act*, the *possessory* lien claimant has been held to take priority over a prior secured party such as a chattel mortgagee or a conditional vendor, usually on the basis of an implied authority of the person in possession to authorize the work, and we have already recommended that such priority should also be provided, with respect to the possessory lien, in the first part of the proposed statute. It has also been seen that the courts in some other jurisdictions have not been as sympathetic to the lien claimant. In the United States, the pre-Code lien statutes have been described as presenting nothing less than a “welter of confusion”,⁵⁴ some statutes providing for the subordination of the possessory lien, some providing for the priority of the lien, and the rest saying nothing about the problem; however, the policy of Article 9 of the Uniform Commercial Code seems to be to favour the lien claimant, and the trend in the United States seems to be in this direction.⁵⁵

⁵⁴ Gilmore, *Security Interests in Personal Property*, Vol. 2, at 883.

⁵⁵ Gilmore, *op. cit.* at 883, referring to the automobile repair business, describes it as “a field in which fraud has become endemic” and suggests that

Besides the “implied authority” argument advanced in favour of the priority of the possessory lien over a prior (that is, earlier) security interest, two policy arguments have been advanced occasionally by those U.S. courts which favour the possessory lien claimant. The first is that the lien claimant has increased the value of the chattel upon which he has performed his services, so that not to recognize his lien would give the holder of the security interest an unjustifiable windfall.⁵⁶ This may well be true, with the proviso that the value of the chattel is rarely increased by the full amount of the labour performed, so that to grant the repairman the full amount of his lien will inevitably impair the security interest of the prior secured party. In addition, if the repair bill exceeds the value of the chattel as repaired (admittedly a rare occurrence, but possible), the security of the prior secured party is destroyed altogether if the lienholder is given priority.⁵⁷ A second policy argument advanced in favour of the possessory lien claimant, usually with respect to automobile repairs, is that even if the prior security agreement has been filed or registered, the garageman or repairman, being a small businessman ignorant of the law, is not the sort of person who consults, or can be expected to consult, records, and he is in no position to refuse his services pending a search against the chattel. A policy argument such as this one is hard to refute, based as it is on economic realities. Perhaps another way of stating the argument is that the possibility of a lien attaching to the chattel in favour of a repairman is simply a risk of doing business that is incurred by a secured party who delivers up possession of the chattel to another person.

Whatever the justification advanced in favour of the priority of the possessory lien claimant over a prior secured party (except a prior lienholder), whether it be the “implied authority” argument advanced by the Ontario (and some U.S.) courts or the more pragmatic “policy” arguments based on economic and social factors advanced occasionally by U.S. courts, it is our view that, taken together, the arguments are fairly persuasive in favour of giving priority to the possessory lien claimant, assuming that he has acted in good faith. The further question to be examined is how the issue of priorities is to be determined between the non-possessory lien claimant and other secured parties, and whether the factors which justify the priority of the possessory lien are equally applicable to the non-possessory lien.

As has already been noted, there is some question as to whether section 32 of *The Personal Property Security Act* applies to the non-

many of the cases which subordinate the repairman’s lien reflect a court’s suspicion that the lien was tainted with fraud.

⁵⁶ This argument was also relied upon by an Ontario court in *Commercial Finance Corporation v. Stratford* (1920), 47 O.L.R. 392.

⁵⁷ Section 32 of *The Personal Property Security Act* may well cover such a situation so as to deny or cut down the priority of the lien claimant, since it is arguable that if the repair bill exceeds the value of the chattel as repaired, the repairs are not within the ordinary course of business of the repairman.

possessory lien. Even if it does apply, if the non-possessory lien is to have any priority, such priority must, because of the wording of the section, appear in the statute creating the lien. The issue of priorities must, therefore, be dealt with in "The Repairman's Lien Act". The question of priorities will be considered first as between the non-possessory lien and a security interest created under *The Personal Property Security Act*, secondly, as between the non-possessory lien and the interest of a *bona fide* purchaser, and thirdly, as among two or more non-possessory liens.

a. Priority Between the Non-Possessory Lien and a Security Interest Created Under *The Personal Property Security Act*

With respect to a security interest arising and perfected before the services giving rise to the non-possessory lien were performed, the same rule should apply to the non-possessory lien as applies to the possessory lien, namely that the non-possessory lien should take priority over such an interest. Failure to provide for such priority would mean that the garageman would refuse to surrender possession of the vehicle on the ground that the priority enjoyed by reason of his possessory lien would thereby be lost. In addition, the policy arguments discussed above in favour of the priority of the possessory lien are equally applicable in our opinion to the non-possessory lien in the circumstances posed.

It is with respect to a security interest arising after the surrender of the vehicle by the garageman that some questions arise concerning priorities, and, as has been noted already, the approach adopted in the legislation in the western provinces is not uniform. There are two possible approaches:

- (1) To provide that once the lien claimant has surrendered possession of the vehicle, any security interest which is created and registered after the surrender of possession and before the lien claimant registers his claim of lien will take priority over the lien if created in good faith and without express notice of the lien;
- (2) To provide that as long as the claim of lien is registered within the required time period, the lien shall have priority over any security interest regardless of when the latter is registered.

In order to ascertain which of these approaches is preferable, it may be helpful to examine once again the various reasons advanced in favour of the priority of the possessory lien and determine their relevance to the non-possessory lien. First, the "implied authority" argument. With respect to a prior conditional sale or chattel mortgage it may be possible to speak of an "implied authority" on the part of a conditional purchaser or chattel mortgagor, given by the vendor or chattel mortgagee, to authorize repairs; but what of the situation where, for example, the chattel mortgage is

given after the repairs are performed? It is much harder to refer to any “implied authority” when there was in fact no mortgagee in existence when the repairs were performed. Whatever “implied authority” there may have been certainly did not, and could not, have flowed from the chattel mortgagee. The “benefit conferred” argument also loses some of its force when applied to a security interest arising after the repairs are performed, since the benefit presumably was conferred before the secured party entered the scene, and it is possible that the value given by the secured party in some way reflected the increased value of the chattel. Thus there may not be any unjustifiable windfall to the secured party if the lien is not given priority. The final argument referred to the lien claimant being a small businessman who cannot be expected to consult records before he performs his services. This argument is persuasive in the context of the possessory lien, and of the non-possessory lien vis-a-vis security interests arising before the repairs were performed, but in view of the fact that the non-possessory lien is an additional benefit conferred upon the garageman for which he must register a claim in any event, there seems little reason not to subject him to the rule that, with respect to interests arising after he has surrendered possession, the usual rule as to priorities should prevail, namely that the first to register takes priority.

In summary, it is our view that the second of the two possible approaches outlined above is unduly favourable to the lien claimant in that he is given priority regardless of the order of registration, and that such priority is not supportable on any of the arguments usually advanced in favour of priority. Once the lien claimant has given up possession of the chattel, he should be subject to the rule that priority of registration prevails against a security interest arising after possession has been surrendered, unless the person claiming the security interest is not acting in good faith or has express notice of the lien.

b. Priority Between the Non-Possessory Lien and the Interest of a *Bona Fide* Purchaser for Value

The legislation should provide that a person who purchases a vehicle in good faith, without express notice of the lien, after possession of the vehicle has been surrendered by the garageman and before the latter has registered his claim of lien, takes the vehicle free of the claim of the garageman. In other words, if the garageman delays in registering his claim of lien, he runs the risk of having his claim cut off by a *bona fide* purchaser for value.

c. Priorities Among Two or More Liens

Where two or more persons claim a non-possessory lien upon the same vehicle, the order of registration should determine the question of priorities between them and we recommend that the legislation so provide.

(iii) SEIZURE AND SALE OF THE VEHICLE

Provision should be made for seizure, during the life of the lien, of a vehicle in respect of which a claim of lien has been registered, by the sheriff of the county or district in which the vehicle is situate, pursuant to a warrant (the form of which should appear in a schedule to the proposed Act) directed to the sheriff. The sheriff would then deliver the vehicle to the garageman, who would have the right to sell the vehicle upon the expiration of a stated period (thirty days is suggested) or the three month period required in the case of a sale pursuant to a possessory lien, whichever is later. The requirements as to notice should be the same as in the case of a sale pursuant to a possessory lien, discussed earlier. Seizure should not be available, however, where the vehicle is in the hands of a person who purchased the vehicle in good faith, without express notice of the lien, after possession was surrendered by the garageman and before the claim of lien was registered.

In view of the system of priorities to be established in the Act, it is necessary that the legislation specify how the proceeds of sale are to be distributed among the various parties claiming an interest in the vehicle. We recommend that the legislation provide that the proceeds of sale be applied consecutively in payment of:

- (i) the cost of seizure of the vehicle,
- (ii) the auctioneer's fee and other reasonable costs of the sale,
- (iii) the claims, if any, of the holder of a security interest under *The Personal Property Security Act* or of a lienholder under "The Repairman's Lien Act" which are entitled to priority over the claim of the garageman, upon application being made in writing to the garageman within a certain stated period after the sale,
- (iv) the amount owing to the garageman for services, and
- (v) the claims, if any, of the holder of a security interest under *The Personal Property Security Act* or of a lienholder under "The Repairman's Lien Act" or of a *bona fide* purchaser for value, ranking behind the claim of the garageman, upon application being made as in (iii),

and that the surplus, if any, be paid to the debtor or other person entitled thereto.

Finally, referring both to a sale by auction pursuant to a possessory lien under the first part of the proposed statute, and to a sale by auction pursuant to a non-possessory lien under the second part, a provision should be enacted to the effect that a disposition of the chattel to a *bona fide* purchaser for value discharges all interests in the chattel existing under *The Personal Property Security Act* and "The Repairman's Lien

Act". There should also be a provision that where the proper procedure as to the sale of the chattel is not complied with, or where there is any dispute as to the disposition of the proceeds of sale either under the first part or the second part of the proposed statute, an application may be made by any person having an interest in the chattel to a Supreme Court judge or to a County or District Court judge having jurisdiction and the court may make such order as it considers necessary in the circumstances.

CHAPTER IV

STORAGE COSTS

As has already been observed,⁵⁸ storage costs incurred during the period of detention pursuant to a possessory lien cannot, apart from agreement, be included as part of the claim for a lien. The Commission has addressed itself to the question as to whether the foregoing common law rule should be modified with respect to the repair of chattels which it has recommended be made subject to a non-possessory lien.

A fundamental characteristic of the non-possessory lien is that both parties involved in the repair operation are benefited: the garageman, because he is not put to the inconvenience and expense of storing the vehicle since he may release the vehicle without losing his lien, and the person who requested the services, because he is not deprived of the use of the chattel. One of the purposes of the non-possessory lien being to eliminate the necessity of storage, the issue of storage costs will not generally arise in the usual situation where the person who requested the repairs calls for the vehicle and it is released to him subject to a non-possessory lien. The garageman would not be obliged to release the vehicle, however, having the alternative open to him of keeping the vehicle and relying on his possessory lien. In view of the fact that the non-possessory lien is of benefit not only to the garageman but also to the person who requested the repairs, we are of the opinion that the provision of some incentive is warranted to increase the likelihood of reliance upon the non-possessory lien. One such incentive is provided by not changing the present common law rule which disallows the claiming of storage costs incurred during the period of detention pursuant to a possessory lien. In the view of the Commission, where the garageman has the option of relying on a possessory lien or on a non-possessory lien and he chooses to rely on the former, he should not be able to make a claim for storage costs which may be incurred by him during the period of detention pursuant to the possessory lien. In order to prevent circumvention of this restriction, there should similarly be no claim allowable for storage costs where the garageman has a non-possessory lien and the vehicle, having been seized and returned to him, is stored by him prior to sale.

The foregoing recommendation is based upon the assumption that the garageman has a choice as to the type of lien upon which he may rely. Such an assumption may be valid in the usual situation but does not

⁵⁸ See the cases referred to in footnote 8.

apply where the vehicle is left for repair and subsequently abandoned by the owner so that the garageman is forced to retain possession and is not in a position of being able to choose the type of lien upon which he will rely. It has been brought to the attention of the Commission that this is not an infrequent occurrence. In such circumstances it appears reasonable to us that the garageman should be permitted to include an amount for storage costs in his claim for a possessory lien.⁵⁹ The amount claimable for storage could be expressed as a "reasonable" sum or an exact amount could be specified by regulation, although the latter alternative may prove to be somewhat impracticable in view of the diversity of rental costs throughout the province.

We are, therefore, in agreement with the recommendation of the 1955 Select Committee of the Ontario Legislature⁶⁰ that a lien for storage should arise where the vehicle is not claimed within ten days after invoicing to the person who requested the repairs when it is ready for delivery. The lien for storage should continue until such time as the vehicle is sold pursuant to the power of sale of the possessory lienholder, unless, however, the vehicle is claimed before that time. In the latter case the garageman would have the choice of releasing the vehicle or continuing to rely on his possessory lien, and a claim for further storage charges should not be permitted, on the same reasoning as was propounded earlier. Such storage charges as have accrued up to that point would, however, be included in the claim for a non-possessory lien.

We are of the opinion that the scheme proposed in respect of the treatment of storage costs effects a proper balance between the interest of the garageman and the interest of the person who has requested the services. The underlying rationale is not to benefit one party at the expense of the other, but rather to encourage reliance upon the non-possessory lien where possible, thereby remedying the deficiencies in the present law from the point of view both of the garageman and of the person who has requested the repairs.

The situation where a person who repairs chattels incurs storage costs as a result of his reliance upon a possessory lien should be distinguished from the situation where the storage costs are incurred pursuant to a contract to store chattels. Our concern in this report is with a person who repairs chattels, not with a person whose business it is to store chattels. A person who receives goods for storage for reward is a "warehouseman" within the meaning of *The Warehousemen's Lien Act*,⁶¹ and has a lien pursuant to that Act. Detailed provisions are set out in that Act as to what may be included in the lien and the procedure as to

⁵⁹ In some cases, of course, the abandoned vehicle may have such a low value that the sale proceeds may not cover the cost of the repairs, let alone any storage costs that may accrue, so that the question as to whether or not storage costs may be included in the lien is rendered somewhat academic.

⁶⁰ See footnote 23.

⁶¹ R.S.O. 1970, c. 488.

sale of the chattels pursuant to the lien. The definition of “warehouseman” which appears in *The Warehousemen’s Lien Act* would seem to be broad enough to cover a person who is in the business of storing vehicles, although there are some cases which interpret the word “warehouseman” somewhat narrowly.⁶² A brief reference should also be made to the lien for storage of a motor vehicle conferred under section 154 of *The Highway Traffic Act*,⁶³ where the vehicle is impounded or where it has been abandoned and taken by a constable to a place of storage.

⁶² *C.P.R. v. Parry Sound*, [1952] O.W.N. 557; *Re Capital Tobacco Co. Ltd.* (1925), 29 O.W.N. 137.

⁶³ R.S.O. 1970, c. 202.

CHAPTER V

SUMMARY OF RECOMMENDATIONS

The Commission recommends that:

1. Section 48 of *The Mechanics' Lien Act* be repealed.
2. A new statute be enacted, entitled "The Repairman's Lien Act", to govern possessory and (where applicable) non-possessory repairmen's liens.
3. The first part of the proposed statute should govern the repairman's possessory lien given at common law, and make provision for the following:
 - (a) There should be (as at present) a power of sale in the hands of a person who has bestowed money, skill or materials upon any chattel or thing in the alteration or improvement of its properties or for the purpose of imparting additional value to it, so as thereby to be entitled to a lien on the chattel or thing for the amount or value of the money or skill and material bestowed;
 - (b) The right to sell the chattel, which should be by auction, should be in addition to any other remedy to which the person in question may be entitled, and should be exercisable in case the amount to which he is entitled remains unpaid for three months after it ought to have been paid;
 - (c) The person desiring to sell the chattel should be required to give written notice (served personally upon or left at the residence or last known place of abode of the party to be served or sent by registered mail to his last known post office address) to:
 - (i) any person who has a security interest in the chattel under *The Personal Property Security Act* and who has registered a security agreement under that Act,
 - (ii) any person who has registered a claim of lien pursuant to the second part of "The Repairman's Lien Act" (i.e. a non-possessory lien), and
 - (iii) the person who requested the bestowing of the money, skill or materials upon the chattel or thing;
 - (d) The period of notice required should be fifteen days, and the notice should contain the name of the person indebted, a brief

description of the chattel or thing to be sold, the amount of the debt, a statement that upon payment of the amount due the chattel may be redeemed, a statement that unless the amount due is paid the chattel will be disposed of and the debtor may be liable for any deficiency, and the date, place and time of the auction;

- (e) The lien of a person who has bestowed money, skill or materials upon any chattel or thing in the alteration or improvement of its properties or for the purpose of imparting an additional value to it should, if created in good faith, and so long as the chattel or thing is in the possession of the person claiming the lien, have priority over an existing security interest perfected under *The Personal Property Security Act*, if any, but should be subject to a prior claim of lien (i.e. a non-possessory lien), if any, registered pursuant to the second part of “The Repairman’s Lien Act”;
- (f) The proceeds of the sale should be applied consecutively in payment of:
 - (i) the costs of the sale,
 - (ii) the claim, if any, of a person who has registered a prior claim of lien under “The Repairman’s Lien Act”, (i.e. a non-possessory lien), upon application being made in writing within a certain stated period of the sale,
 - (iii) the amount due to the person claiming a possessory lien, and
 - (iv) the claim, if any, of a person who has a security interest in the chattel under *The Personal Property Security Act* and who has registered a security agreement under that Act, upon application being made as in (ii),

and the surplus, if any, should be paid to the debtor or other person entitled thereto.

4. The second part of the proposed statute should create a non-possessory lien in the hands of a garageman who has performed services upon a vehicle, and contain provisions governing the lien.

- (a) The following terms should be defined:
 - (i) “Garage” means a building or part of a building within or in connection with which services are rendered upon a vehicle in the ordinary course of business;
 - (ii) “Garageman” means an individual who, or a firm or corporation which, renders services upon a vehicle in a garage for or at a charge, price or consideration in the ordinary course of business and as the principal employment or one

of the principal employments of such individual, firm or corporation;

- (iii) "Services" means *bona fide* repairs to a vehicle by labour or by supplying parts thereof or accessories thereto, or the painting of a vehicle, but does not include the supplying of gas, oil or grease to a vehicle;
 - (iv) "Vehicle" means a motor vehicle, commercial motor vehicle, trailer, farm tractor, self-propelled instrument of husbandry, road-building machine, motorized snow vehicle, and any vehicle propelled or driven by any kind of power other than muscular power and includes an aircraft, but does not include a vehicle that runs only on tracks or rails or a vessel used or designed to be used in navigation. The terms "motor vehicle", "commercial motor vehicle", "trailer", "farm tractor", "self-propelled implement of husbandry" and "road-building machine" shall have the same meaning as in *The Highway Traffic Act*, and the term "motorized snow vehicle" shall have the same meaning as in *The Motorized Snow Vehicles Act*;
- (b) A garageman should be able to surrender possession of a vehicle to the person at whose request he has performed services upon the vehicle without losing any lien that he may have with respect to the indebtedness acquired by him for the services, if, before surrendering possession, he obtains from such person or his agent an acknowledgment of indebtedness by requiring that person or the agent to sign an invoice or other statement of account;
 - (c) The signing of the invoice or statement of account should not preclude the person who has requested the services from disputing in any subsequent proceedings the amount claimed by the garageman;
 - (d) The lien referred to above should cease and determine unless the garageman registers a claim of lien within 21 days after the surrender of possession of the vehicle;
 - (e) The claim of lien should state the name and address of the garageman and of the person against whom the lien is claimed, set forth a copy of the acknowledgment of indebtedness, give a description of the vehicle (licence number, if any; serial number, if any; make; model; style and year; registration letters, if any) and the services rendered, and state the amount claimed;
 - (f) The claim of lien should be registered with the registrar of personal property security, or with a branch registrar. Provision should be made for the keeping of records by the registrar,

for the endorsing of claims with the time and date of receipt, and for the prescribing by regulation of the fees for registration, of any forms that may be necessary, or of any other material necessary to carry out effectively the intent and purpose of the legislation;

- (g) The lien should continue for a period of six months from the date of registration of the claim of lien unless within that period seizure of the vehicle is effected pursuant to the provisions of the statute relating to seizure;
- (h) Provision should be made for the registration of a discharge of lien if the amount due in respect of the lien is paid to the garageman;
- (i) The Assurance Fund established under *The Personal Property Security Act* should not be made to apply to non-possessory liens created under "The Repairman's Lien Act";
- (j) With regard to priorities between the garageman's non-possessory lien and other interests in the same vehicle:
 - (i) where a garageman has registered a claim of lien, the lien should take priority over a security interest under *The Personal Property Security Act* which arose and was perfected before the services giving rise to the non-possessory lien were performed,
 - (ii) where a garageman has registered a claim of lien, the lien should be subject to a security interest under *The Personal Property Security Act* which was created and registered in good faith without express notice of the lien after the surrender of possession of the vehicle and before the claim of lien was registered, but the lien should be clearly stated to have priority over the security interest in all other circumstances,
 - (iii) a person who purchases a vehicle in good faith, without express notice of the lien, after possession of the vehicle has been surrendered by the garageman and before the latter has registered his claim of lien, should take the vehicle free of the claim of the garageman,
 - (iv) where two or more garagemen claim a non-possessory lien upon the same vehicle, the order of registration should determine priorities among them;
- (k) Provision should be made for seizure during the life of the lien of a vehicle in respect of which a claim of lien has been registered, by the sheriff of the county or district in which the vehicle is situate, pursuant to a warrant directed to the sheriff. The

vehicle would be delivered to the garageman, who should have the right to sell the vehicle by auction upon the expiration of thirty days or the three month period required in the case of a sale pursuant to a possessory lien, whichever is later. Seizure should not be available, however, where the vehicle is in the hands of a person who purchased the vehicle in good faith, without express notice of the lien, after possession was surrendered by the garageman and before the claim of lien was registered;

- (l) The requirements as to notice should be the same as in the case of a sale pursuant to a possessory lien;
- (m) The proceeds of sale should be applied consecutively in payment of:
 - (i) the cost of seizure of the vehicle,
 - (ii) the auctioneer's fee and other reasonable costs of the sale,
 - (iii) the claims, if any, of the holder of a security interest under *The Personal Property Security Act* or of a prior lienholder under "The Repairman's Lien Act" which are entitled to priority over the claim of the garageman, upon application being made in writing to the garageman within a certain stated period of the sale,
 - (iv) the amount owing to the garageman for services, and
 - (v) the claims, if any, of the holder of a security interest under *The Personal Property Security Act* or of a lienholder under "The Repairman's Lien Act" or of a *bona fide* purchaser for value, ranking behind the claim of the garageman, upon application being made as in (iii),

and the surplus, if any, should be paid to the debtor or other person entitled thereto.

5. To encourage reliance (where applicable) upon the non-possessory lien, where a garageman has the option of relying on a possessory lien or on a non-possessory lien and he chooses to rely on the former, he should not be able to make a claim for storage costs which may be incurred by him during the period of detention pursuant to the possessory lien. Neither should a claim for storage be allowed where the garageman has a non-possessory lien and the vehicle, having been seized and returned to him, is stored by him prior to sale.

However, where the vehicle is not claimed within ten days after invoicing to the person who requested the repairs when it is ready for delivery, a lien for storage should be permitted for a "reasonable" sum

or for an amount fixed by regulation, until such time as the vehicle is claimed or is sold pursuant to the power of sale.

6. (a) A sale of a chattel by auction pursuant to a possessory lien under the first part of the proposed statute, and a sale of a vehicle by auction pursuant to a non-possessory lien under the second part of the proposed statute, to a *bona fide* purchaser for value, should discharge all interests in the chattel existing under *The Personal Property Security Act* and “The Repairman’s Lien Act”;
- (b) Where the proper procedure as to the sale of the chattel is not complied with, or where there is a dispute as to the disposition of the proceeds of sale either pursuant to a possessory lien or pursuant to a non-possessory lien, provision should be made for an application by any person having an interest in the chattel to a Supreme Court judge or a County or District Court judge having jurisdiction, and the court should be able to make such order as it considers necessary.

CHAPTER VI

CONCLUSION

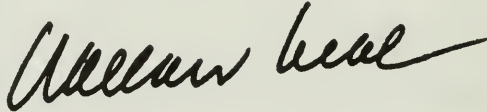
The present law in Ontario, under which a lien is conferred upon a person for the repair of chattels so long as possession is retained, is clearly inadequate with respect to the repair of certain chattels. The emphasis on possession results in an unsatisfactory situation from the point of view of both parties involved: the repairman, who is forced, often at some inconvenience, to retain possession of the chattel in order to preserve his lien, thereby incurring storage costs which cannot, apart from agreement, be included in his claim for a lien, and the owner of the chattel, who is deprived of the use of the chattel so long as it is retained by the repairman and who may thereby suffer severe hardship. The Commission has concluded that the deficiencies in the present law are most apparent with respect to certain large, expensive chattels which are often needed for purposes of earning a living or producing income, and which are subject to a high frequency of repair, such as automobiles, farm vehicles, trucks and aircraft, and it is with respect to the repair of these types of chattels that we recommend that a non-possessory "garageman's" lien be created.

As has been emphasized throughout the report, the non-possessory lien benefits both the garageman in question and the owner of the chattel. The former is benefited because he does not have to store the chattel and may release the chattel without losing his lien, and the latter because he is not deprived of the use of the chattel until such time as he pays for the services performed. Because of this dual advantage inherent in the non-possessory lien, the Commission considers it desirable that the garageman be encouraged where possible to utilize the non-possessory lien. The recommendations in respect to the treatment of storage costs are put forward with this end in view.

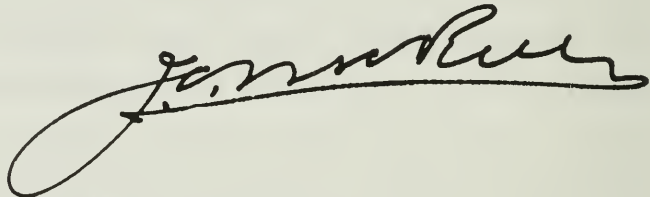
In this report the Commission has focused on some of the problems involved in the creation and operation of a non-possessory repairman's lien. A large number are similar to those faced in the western provinces, and some of our recommendations are based on the legislation in existence in those provinces, where experience with the non-possessory lien appears to have been most satisfactory. Some of the problems discussed are different and flow from the particular legislative environment in Ontario, of which *The Personal Property Security Act* constitutes an important integral part. The recommendations contained in the report will provide, it is hoped, the framework for a more satisfactory state of the law than exists at present with respect to the repairman's lien.

The Commission wishes to record its special thanks to John F. Layton, the legal research officer primarily concerned with the production of this report. The proposals dealing with the difficult problems of priorities and the disposition of proceedings on the sale of an encumbered chattel reflect his thorough and competent legal scholarship. We are grateful for his most capable assistance.

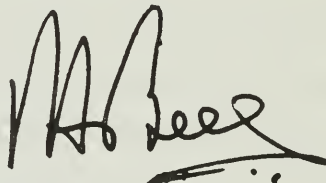
All of which is respectfully submitted.



H. ALLAN LEAL,
Chairman.



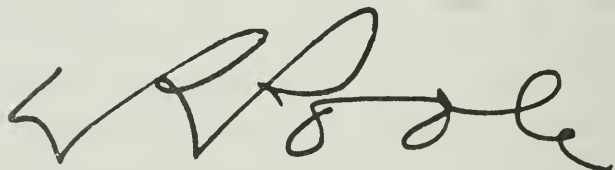
JAMES C. McRUER,
Commissioner.



RICHARD A. BELL,
Commissioner.



W. GIBSON GRAY,
Commissioner.



WILLIAM R. POOLE,
Commissioner.

October 4, 1972.

APPENDICES

APPENDIX A	THE GARAGEMEN'S LIEN ACT — REVISED STATUTES OF ALBERTA 1970, CHAPTER 155 (AS AMENDED)	51
APPENDIX B	THE MECHANICS' LIEN ACT — REVISED STATUTES OF BRITISH COLUMBIA 1960, CHAPTER 238 (AS AMENDED)	57
APPENDIX C	THE GARAGE KEEPERS ACT — REVISED STATUTES OF MANITOBA 1970, CHAPTER G10 (AS AMENDED)	60
APPENDIX D	THE GARAGE KEEPERS ACT — STATUTES OF SASKATCHEWAN 1970, CHAPTER 25	66

APPENDIX A

THE GARAGEMEN'S LIEN ACT

REVISED STATUTES OF ALBERTA 1970, CHAPTER 155 (AS AMENDED)

1. This Act may be cited as *The Garagemen's Lien Act*.
2. In this Act,
 - (a) "garageman" means a person who keeps a place of business for the housing, storage or repair of a motor vehicle and who receives compensation for such housing, storage or repair;
 - (b) "motor vehicle"
 - (i) means a vehicle propelled by any power other than muscular power, and
 - (ii) includes an aeroplane, but
 - (iii) does not include a motor vehicle that runs only on tracks or rails;
 - (c) "Motor Vehicle Branch" means the Motor Vehicle Branch of the Department of the Provincial Government charged with the administration of *The Highway Traffic Act*;
 - (d) "registration clerk" means a registration clerk in the Motor Vehicle Branch.
3. (1) In addition to every other remedy that a garageman has for the recovery of money owing to him for the storage, repair or maintenance of a motor vehicle, or for the price of accessories furnished for a motor vehicle, a garageman who is entitled to payment of a sum for the storage, repair or maintenance of a motor vehicle, or the furnishing of accessories for a motor vehicle, has a lien on such motor vehicle for the sum to which he is entitled.
 - (2) No garageman is entitled to a lien under this Act for the price of gas, oil or grease furnished for a motor vehicle.
 - (3) No garageman is entitled to a lien under this Act unless before surrendering possession of the motor vehicle he obtains from
 - (a) the person who authorized the storage, repair or maintenance, or his duly authorized agent, or
 - (b) the person who ordered that accessories be furnished for the motor vehicle, or his duly authorized agent,an acknowledgment of indebtedness by requiring that person or his agent to sign an invoice or other statement of account.

4. (1) A lien referred to in section 3 ceases and determines on the 21st day after the day

- (a) that the storage of any motor vehicle for which the lien is claimed terminated, or
- (b) that the repairs to the motor vehicle were completed, or
- (c) that the accessories for the motor vehicle were furnished,

as the case may be, unless on or before the 21st day the garageman files or causes to be filed a claim of lien, which shall be in Form A in the Schedule, in the office of the registration clerk together with an affidavit made by the garageman or his agent verifying the claim, which shall be in Form B in the Schedule.

(2) Every such claim shall be signed by the garageman or by a person authorized by him to do so.

(3) The registration clerk shall cause an alphabetical index to be kept of all claims of lien filed with him according to the maker of the motor vehicle and setting out the model, year, and serial number of the motor vehicle to which the claim relates, and shall cause to be endorsed upon each claim received by him the time and date of its receipt.

5. Every lien upon a motor vehicle under this Act shall be postponed to an interest in, or charge, lien or encumbrance on the motor vehicle,

- (a) that is created or arises
 - (i) in good faith,
 - (ii) without express notice of the first mentioned lien, and
 - (iii) at a time during which the motor vehicle is out of the possession of the person entitled to the lien under this Act, and
- (b) that was created or arose before the filing of the claim of lien pursuant to this Act.

6. (1) If at any one time more persons than one have a lien under this Act upon the same motor vehicle,

- (a) the person whose claim of lien is filed earlier in time has a prior lien over that of the person whose claim of lien is filed later in time, and
- (b) if one of such persons causes a seizure to be made of the motor vehicle, he shall be deemed to have made that seizure on behalf of all persons who have upon the motor vehicle a lien subsisting at the time of seizure.

(2) If at any one time a person has more than one lien under this Act on the same motor vehicle, seizure of the motor vehicle under any one

of the liens constitutes a seizure in respect of all of the liens of that person on the motor vehicle.

7. (1) Upon the filing of a claim of lien pursuant to this Act, the lien continues for a further period of six months from the date of filing.

(2) A lien determines upon the expiry of six months from the date of filing thereof unless, within the period of six months,

(a) there is issued and delivered to the sheriff a true copy of the lien and a warrant in Form C in the Schedule, addressed to the sheriff of the judicial district in which the motor vehicle that is subject to the lien is for the time being and directing the sheriff to seize the motor vehicle in accordance with the requirements of *The Seizures Act*, and

(b) seizure of the motor vehicle that is subject to the lien has been effected.

(3) Notwithstanding subsection (2), where it appears that a seizure cannot be effected within the six months provided for in that subsection, a judge may, on *ex parte* application made during those six months, extend the time within which the seizure may be made for a further period not exceeding six months from the date of the order, and in that case the lien does not determine until the date so specified, if a certified copy of the order is filed with the registration clerk prior to the expiration of the six months period provided for in subsection (2).

7.1 The garageman upon receipt of the amount due in respect of the lien he holds shall sign and deliver to a person who demands it a memorandum in writing stating that his lien is discharged.

8. The sheriff shall, in accordance with *The Seizures Act*, seize or cause to be seized the motor vehicle in respect of which the warrant was issued if it is found anywhere within the judicial district for which the sheriff is appointed.

9. (1) Upon a seizure of a motor vehicle pursuant to this Act, *The Seizures Act*, except where expressly otherwise provided in this Act, governs and applies to the seizure, and the lienholder shall, subject to subsection (2), enforce his rights and remedies under this Act in accordance with the provisions of that Act.

(2) The proceeds of the sale shall be applied first in payment of the expenses of the sale and then in payment of the lienholder's debt, and thereafter payment out of the balance, if any, shall be governed by the provisions of *The Seizures Act* respecting the payments of a surplus remaining after distraint under that Act.

10. Where forms are prescribed by this Act, a substantial compliance with the requirements of the form is sufficient and a lien is not invalidated

by a failure to comply strictly with the requirements of the prescribed form unless any person having an interest in the subject matter of the lien is prejudiced thereby.

11. (1) The Lieutenant Governor in Council may from time to time prescribe a tariff of fees which may be charged in respect of a warrant and a seizure thereunder or any matter or thing incidental thereto.

(2) The Lieutenant Governor in Council may by regulation prescribe forms for use under this Act and make rules governing the manner of issuing, delivering or filing warrants or other documents with sheriffs.

12. The Lieutenant Governor in Council may prescribe a tariff of fees to be charged for registering any document, for issuing any certificate and for rendering any other service under this Act.

SCHEDULE

FORM A

(Section 4)

CLAIM OF LIEN

A.B. of
(name of claimant) (address of claimant)

carrying on the business of a garageman at
(give address)

pursuant to *The Garagemen's Lien Act*, claims a lien upon a certain vehicle (here set out the licence number, if any, of the vehicle, and the make, style, year and model thereof and the serial number of the vehicle) in respect of (the storage, repair, maintenance and accessories, or any of them, as the case may be,) shown on the attached invoice or statement of account, together with the dates thereof, of of

(name) (address)

who authorized the (storage, repair, maintenance or furnishing of accessories, as the case may be,) for which a lien in the sum of \$..... is claimed has (himself or by his authorized agent) acknowledged indebtedness to me for the amount claimed by signing an invoice or other statement of account.

The address for service of the claimant is
.....
.....

Dated at this day of
....., 19.....

.....
(Signature of claimant or his agent)

FORM B

(Section 4)

AFFIDAVIT VERIFYING CLAIM

I,, named in the above or annexed claim, make oath and say that to the best of my knowledge, information and belief the statements set out in the said claim are true.

Sworn before me at)
in the Province of)
this day of)
19.....)
.....)
Commissioner for Oaths
(or as the case may be)

FORM C

(Section 7)

WARRANT

The Garagemen's Lien Act

TO THE SHERIFF

Judicial District of, my bailiff in this behalf.

You are hereby requested and authorized to seize a certain motor vehicle described as follows:

Make Model
Year Licence Number
Serial number

the property of of in the Province of Alberta and now in the possession of at Alberta, which said motor vehicle is subject to a certain garagemen's lien filed with the Registration Clerk for the Motor Vehicle Branch on the day of A.D. 19..., at o'clock for repairs, maintenance of or the furnishing of accessories for the said motor vehicle, (a true copy of such lien being hereunto attached) to realize the sum of \$..... and costs.

I hereby indemnify the said sheriff for his fees, charges, and expenses and any claims for damages in respect of the seizure of the said motor vehicle and any thing done in relation thereto.

Dated at, Alberta, this day of,
A. D. 19.....

.....
(Signature)
Name and address of Garageman

.....
(Witness)

APPENDIX B

THE MECHANICS' LIEN ACT

REVISED STATUTES OF BRITISH COLUMBIA 1960,
CHAPTER 238 (AS AMENDED)

1. This Act may be cited as the *Mechanics' Lien Act*.
2. In this Act, unless the context otherwise requires,
“aircraft” means any machine used or designed for navigation of the air;
. . .
“garage-keeper” means any person who keeps a place of business for the sale of motor accessories or for the storage or repair of motor-vehicles or aircraft;
. . .
“motor-vehicle” has the same meaning as in the *Motor-vehicle Act*, and includes a trailer as defined therein;
. . .

LIENS ON CHATTELS

42. Every mechanic or other person who has bestowed money, skill, or materials upon any chattel in the alteration and improvement of its properties, or increasing its value, so as thereby to become entitled to a lien upon the chattel for the amount or value of the money, skill, or materials bestowed, has, while the lien exists, but not afterwards, in case the amount to which he is entitled remains unpaid for ninety days after the same ought to have been paid, power to sell the chattel in respect of which the lien exists, on giving two weeks' notice by advertisement in a newspaper published in the city, town, or county in which the work was done, or in case there is no newspaper published in such city, town, or county, then in a newspaper published in the Province nearest thereto, stating the name of the person indebted, the amount of his indebtedness, a description of the chattel to be sold, and the time and place of sale; and after the sale the mechanic or other person shall apply the proceeds of the sale in payment of the amount due to him, and the costs of advertising and sale, and shall pay over the surplus (if any) to the person entitled thereto, on application being made to him therefor, and a notice in writing of the result of the sale shall be left at or mailed to the address of the owner at his last-known place of abode or business.

43. If a garage-keeper, before surrendering possession of a motor-vehicle or aircraft, obtains from the person at whose request he has bestowed money or skill or materials upon it an acknowledgment of indebtedness by requiring that person to sign an invoice or other statement of account, he does not, by surrendering possession of the motor-vehicle or aircraft, lose

any lien for the indebtedness acquired by him thereon; but unless, in the meantime, he causes an affidavit of lien to be filed in the office of the Registrar-General, the lien, on the expiration of fifteen days after possession is surrendered, ceases to exist.

44. An affidavit of lien may be made by the garage-keeper or by anyone acting for him, and it may be based on information and belief, the source of the information being given. In the affidavit of lien the affiant shall

- (a) state the name, description, and address of the garage-keeper and of the person against whom the lien is claimed;
- (b) set forth a copy of the acknowledgment of indebtedness;
- (c) give a description
 - (i) of the motor-vehicle on which the lien is claimed, including the serial number; or
 - (ii) of the aircraft on which the lien is claimed, including the model, serial number, if any, and the registration letters thereof;
- (d) state that the garage-keeper claims a lien on the motor-vehicle or aircraft.

45. At the time of the filing of the lien, the garage-keeper shall cause to be paid to the Registrar-General a fee of one dollar.

46. Upon the filing of every affidavit of lien, the Registrar-General shall forthwith assign to it a distinctive filing number, and shall cause a record of the lien to be entered on the records or files kept in his office relating to the motor-vehicle or aircraft that is the subject of the lien.

47. Upon the filing of an affidavit of claim of lien under this Act, the lien continues for a further period of one hundred and eighty days from the date of filing, and ceases to exist upon the expiration of that period, unless, in the meantime, the motor-vehicle or aircraft has been seized under section 49, in which case the lien continues for so long as the motor-vehicle or aircraft remains in the possession of the Sheriff or of the garage-keeper, but the Registrar-General shall cancel the registration of the lien in his records.

48. Where any charge, encumbrance, or mortgage on or claim to a motor-vehicle or aircraft is created and registered with the Registrar-General after a garage-keeper has surrendered possession of the motor-vehicle or aircraft and before the filing of an affidavit of lien in respect thereof, that charge, encumbrance, mortgage, or claim, if created in good faith and without express notice of the lien of the garage-keeper, has priority over that lien.

49. (1) At any time while the lien of a garage-keeper is subsisting, the garage-keeper may issue a warrant addressed to a bailiff duly licensed under the *Collection Agents' Licensing Act*, or to the Sheriff of the county

or district in which the motor-vehicle or aircraft subject to the lien is for the time being, directing the bailiff or the Sheriff to seize the motor-vehicle or aircraft within one hundred and eighty days after the date of the filing of the lien and to return the same to the garage-keeper; and it is the duty of the bailiff or the Sheriff upon receipt of the warrant and of his fees, and he is empowered by himself or his employee, deputy, or officer, to seize within the said period of one hundred and eighty days the motor-vehicle or aircraft if it is found in the territory, county, or district for which the bailiff is licensed or for which the Sheriff is appointed and to deliver it to the garage-keeper.

(2) No bailiff, sheriff, or other person shall demand or take, under the authority of this section, any fee or compensation other than that set out in the Schedule to this Act.

50. When a motor-vehicle or aircraft has been delivered to a garage-keeper under section 49, the garage-keeper may sell the motor-vehicle or aircraft in the manner provided, and subject to the same conditions as to advertisement and otherwise as are contained in section 42.

...

57. Where directed to do so by the Attorney-General, the Registrar-General, Registrar, or County Court Registrar shall

- (a) cause any document filed in his office under this Act to be photographed on microfilm; and
- (b) thereafter return the document to the person who filed it, and the microfilm, for the purpose of this Act, shall be deemed to be the original or copy of the document.

...

SCHEDULE OF FEES

(Section 49)

Receiving and filing warrant to seize	\$ 5.00
Seizure under the warrant	15.00
Delivery to garage-keeper	15.00
Mileage actually and necessarily travelled, per mile30
All reasonable and necessary expenses and disbursements with respect to seizure and delivery, the actual cost.	

APPENDIX C

THE GARAGE KEEPERS ACT

REVISED STATUTES OF MANITOBA 1970,
CHAPTER G10 (AS AMENDED)

SHORT TITLE.

1. This Act may be cited as: "The Garage Keepers Act".

DEFINITIONS.

2. In this Part,

- (a) "garage" means a building or part of a building within or in connection with which any service is rendered upon a motor vehicle in the ordinary course of business;
- (b) "farm vehicle" means a farm machine or other machine or equipment
 - (i) the selling price of which is fifty dollars or more; and
 - (ii) that is used, or intended for use, in any type of farming operations;

except such a machine or equipment owned by a corporation, but does not include a motor vehicle other than

- (iii) a farm truck as defined in The Highway Traffic Act; or
 - (iv) a farm tractor;
- (c) "garage keeper" means a person, firm, or corporation, who or which renders service upon a motor vehicle in a garage for or at a charge, price, or consideration, in the ordinary course of business and as the principal employment or one of the principal employments of that person, firm, or corporation;
 - (d) "motor vehicle" includes automobile, motor bicycle, tractor, and any other vehicle propelled or driven otherwise than by muscular power, and any internal combustion engine; but does not include a car of an electric or steam railway, or any other vehicle running only upon rails, or a trolley bus;
 - (e) "service" means
 - (i) the making of bona fide repairs to a motor vehicle or farm vehicle, or any part, accessory or equipment pertaining thereto, by or under the supervision of an automobile repair mechanic who holds a valid and subsisting certificate of qualification as such issued pursuant to The Apprenticeship Act, or The Tradesmen's Qualification Act, or by the supplying of parts or accessories therefor; or

- (ii) the painting, storing, or caring for a motor vehicle or farm vehicle, or any part, accessory or equipment pertaining thereto, by a garage keeper.

GARAGE KEEPER'S LIEN.

3. Subject to subsection (6) of section 6, every garage keeper has a lien upon every motor vehicle or farm vehicle for service rendered upon it by the garage keeper to an amount not exceeding the charge, price, or consideration therefor.

RIGHT OF DETENTION AND PRIORITY.

4. Where a garage keeper has in his custody or possession a motor vehicle or farm vehicle, or any part thereof, or accessory or equipment pertaining thereto that belongs to a person who is indebted to him for any service, and, subject to subsection (1) of section 6, the garage keeper has had such custody or possession since the time the service was rendered, he may detain it in his custody or possession; and, subject to section 9, the right of detention provided by this section has priority over, and is not subject to, any lien, lien note, chattel mortgage, bill of sale, or other charge or encumbrance of whatever nature or kind, upon or in respect of the motor vehicle, farm vehicle, or part, accessory, or equipment, pertaining thereto, existing at the time of the detention except a lien under this Act with respect to which a claim of lien has been registered under this Act.

RESPONSIBILITY OF GARAGE KEEPER.

5. Every garage keeper shall keep in his possession, and is responsible for, any motor vehicle and effects detained by him for the full period of the detention, unless they are sooner released.

SURRENDER OF POSSESSION OF VEHICLE OR PART.

6. (1) Where a garage keeper has a lien on a motor vehicle or a farm vehicle, or any part, accessory or equipment pertaining thereto, he may surrender possession of the motor vehicle or farm vehicle, or part, accessory or equipment pertaining thereto, to the owner without losing his lien if

- (a) before surrendering possession to the owner, he obtains from the owner an acknowledgment of the indebtedness with respect to which the lien arose, by requiring the owner to sign an invoice or other statement of account for the service rendered; and
- (b) either before surrendering possession to the owner or within twenty days thereafter, he registers a claim of lien
 - (i) where the lien is on a motor vehicle or a farm vehicle that is required to be registered under The Highway Traffic Act, or any part, accessory or equipment pertaining thereto, with the clerk of the County Court of Winnipeg, and

- (ii) where the lien is on a farm vehicle that is not required to be registered under The Highway Traffic Act, or any part, accessory or equipment pertaining thereto, with the clerk of the County Court district in which the owner resides.

FORM OF CLAIM OF LIEN.

6. (2) The claim of lien may be in the form set out in the Schedule and shall state
- (a) the name and address of the garageman claiming the lien;
 - (b) the name and address of the owner;
 - (c) a description of the motor vehicle or farm vehicle, or part, accessory, or equipment pertaining thereto, upon which the lien is claimed including the serial number, if any, and the registration number if a motor vehicle that is required to be registered under The Highway Traffic Act;
 - (d) the sum claimed as owing for the service rendered;
 - (e) a description of the service rendered or part or accessory supplied;
 - (f) the last date upon which the service was rendered.

AFFIDAVIT.

6. (3) The claim of lien shall be accompanied by an affidavit of the garage keeper stating that the facts set forth in the claim of lien are true.

FEE FOR REGISTRATION.

6. (4) For registering a claim of lien under this Act, the clerk of the County Court with whom the claim of lien is registered is entitled to receive a fee of one dollar.

INDEXING, ETC.

6. (5) The clerk of each County Court shall cause every claim of lien registered with him under this Act to be numbered, endorsed with a memorandum of the date, hour, and minute of its registration and indexed, by entering in alphabetical order in a register kept by him, the names of the parties to the lien, its number and the date of its registration.

COST OF REGISTRATION SECURED BY LIEN.

6. (6) The costs of registration of the claim of lien may be added to the amount owing to the garage keeper and secured by the lien.

EXPIRY OF REGISTERED LIEN.

7. Where a garage keeper has registered a claim of lien under section 6, the lien continues for a period of eight months from the day upon which

the claim of lien was registered, unless in the meantime the motor vehicle or farm vehicle, or part, accessory or equipment pertaining thereto, is sold by the garage keeper under this Act, or the indebtedness with respect to which the lien arose is paid; but the lien ceases to exist upon the expiration of that period unless prior to the expiration of the period, the motor vehicle or farm vehicle, or part, accessory or equipment pertaining thereto, has been seized under subsection (1) of section 8, or an action of replevin has been commenced under subsection (2) of section 8.

SEIZURE UNDER LIEN.

8. (1) Where a garage keeper has registered a claim of lien under section 6, he may, while the lien continues, seize the motor vehicle or farm vehicle, or part, accessory or equipment pertaining thereto, upon which he has the lien, and may detain the motor vehicle or farm vehicle, or part, accessory or equipment in his custody or possession and the lien shall continue while the motor vehicle or farm vehicle, or part, accessory or equipment, is detained in his custody or possession.

REPLEVIN ACTION.

8. (2) For the purpose of recovering possession or custody of a motor vehicle or farm vehicle, or part, accessory or equipment pertaining thereto, under subsection (1), a garage keeper who has registered a claim of lien under section 6 may, while the lien continues, bring an action of replevin under The Replevin Act.

INTERVENING CLAIMS.

9. Where a garage keeper has registered a claim of lien under section 6, the lien is subject to any interest in, or charge, lien, or encumbrance upon the motor vehicle or farm vehicle, or the part, accessory or equipment pertaining thereto, that arose or was created in good faith without express notice of the first-mentioned lien after possession was surrendered to the owner and before the claim of lien was registered and to any claim of lien registered under this Act prior to the date the service, with respect to which the first-mentioned lien arose, was rendered.

POWER OF SALE.

10. Where a motor vehicle or farm vehicle, or part, accessory or equipment pertaining thereto, has been seized under section 8, or where a motor vehicle or farm vehicle, or part, accessory or equipment pertaining thereto has been detained under section 4, if, after the expiration of the period mentioned in section 11, indebtedness with respect to which the lien arose has not been paid, the garage keeper may sell the motor vehicle or farm vehicle, or part, accessory or equipment at public auction.

WHEN VEHICLE MAY BE SOLD.

11. The sale as aforesaid may be held at any time after the expiration of two months from the day when the lien first arose.

PROCEDURE FOR SALE BY AUCTION.

12. (1) Before any such sale is held, the garage keeper shall insert in one issue of The Manitoba Gazette, and post and keep posted during the period of at least two weeks on the outside of a front door of his garage, a notice of the intended sale, stating the name, so far as known, of the owner of any motor vehicle or farm vehicle, or part, accessory, or equipment pertaining thereto to be sold, a general description of the motor vehicle or farm vehicle, or part, accessory, or equipment pertaining thereto to be sold, the time and place of sale, and the name of the person who is to act as auctioneer.

APPLICATION OF PROCEEDS.

12. (2) After the sale the garage keeper shall apply the proceeds of the sale in payment of the amount due to him as aforesaid, the cost of accommodation during the period of detention at the rates agreed upon for accommodation, the cost of seizure, where the article to be sold has been seized under section 8, the costs of advertising, the fee of the auctioneer, and all other reasonable costs of the sale.

DISPOSITION OF SURPLUS, IF ANY.

12. (3) The garage keeper shall pay over the surplus, if any, to the person entitled thereto on application being made by him therefor; and, if application therefor is not forthwith made, he shall immediately pay the surplus to the clerk of the County Court of the County Court district in which the garage is situated, to be kept by him for the person entitled for one year, after which time, if that person does not appear or claim the amount so kept, it shall be paid over to the Minister of Finance and form a part of the Consolidated Fund.

ACT TO BE KEPT POSTED UP.

13. Every garage keeper shall have and keep a copy of this Act conspicuously posted up in the office, and in at least two other conspicuous places in the garage; and, unless he complies with this section, he is not entitled to the benefits of this Act.

. . . .

SCHEDULE

(Subsection (2) of Section 5A)

CLAIM OF LIEN

under The Garage Keepers Act

A.B. of
(name of claimant) (here give address of claimant)

under The Garage Keepers Act, claims a lien upon the property of
..... of

(here state name of owner) (here give address of owner)
described as follows:

.....
.....
(here give description of motor vehicle, etc.)

in respect of the following service rendered:

.....
.....
(here give description of service rendered)

which service was last rendered on the day of
19 .. .

The amount claimed as owing is the sum of
dollars.

dated at .. ., in Manitoba, this day of
19 .. .

(signature of claimant)

(Subsection (3) of Section 5A)

AFFIDAVIT

I of the
in the Province of, make oath and say:

- 1. I am the claimant named in the foregoing (or annexed) claim of lien.
- 2. The statements made in the foregoing (or annexed) claim of lien are true.

Sworn before me at,)
in the of,)
this day of,)
19 .. .)

A Commissioner, etc.

APPENDIX D

THE GARAGE KEEPERS ACT

STATUTES OF SASKATCHEWAN 1970, CHAPTER 25

Her Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

1. This Act may be cited as *The Garage Keepers Act, 1970*.
2. In this Act:
 - (a) "garage" means a building or part of a building within or in connection with which services are rendered upon a motor vehicle in the ordinary course of business;
 - (b) "garage keeper" means an individual who, or a firm or corporation which renders services upon a motor vehicle in a garage for or at a charge, price or consideration in the ordinary course of business, and as the principal employment or one of the principal employments of such individual, firm or corporation;
 - (c) "motor vehicle" means a vehicle propelled by any power other than muscular power and includes an aeroplane but does not include a motor vehicle that runs only on tracks or rails;
 - (d) "registration clerk" means the registration clerk for the Province of Saskatchewan at Regina;
 - (e) "services" means *bona fide* repairs to a motor vehicle by labour or by supplying parts thereof or accessories thereto but does not include the supplying of gas, oil or grease to a motor vehicle.

3.—(1) In addition to every other remedy that a garage keeper has for recovery of money owing to him for services, he has a lien upon every motor vehicle and upon any part, accessory or equipment pertaining thereto for services, in an amount not exceeding the charge, price or consideration therefor.

(2) Actual and continued possession of the motor vehicle or part, accessory or equipment is essential to the existence of a lien under this section.

4. In addition to every other remedy that a garage keeper has for recovery of money owing to him for services, he has, subject to section 6, a lien upon every motor vehicle and upon any part, accessory or equipment pertaining thereto for services, in an amount not exceeding the charge, price or consideration therefor where the garage keeper:

- (a) has given up actual and continued possession of the motor vehicle or part, accessory or equipment pertaining thereto; and

- (b) has, prior to giving up actual and continued possession of the motor vehicle or part, accessory or equipment pertaining thereto, obtained from the person who authorized the services or the duly authorized agent of such person, an acknowledgment of the indebtedness by requiring that person or the agent to sign an invoice or other statement of account respecting the services.

5. *The Mechanics' Lien Act* does not apply to a lienholder under this Act.

6.—(1) A lien referred to in section 4 ceases and determines on the forty-fifth day after the day that the garage keeper gives up actual possession of the motor vehicle unless on or before the forty-fifth day the garage keeper files or causes to be filed a claim of lien in form A, in the office of the registration clerk together with an affidavit in form B made by the garage keeper or his agent verifying the claim.

(2) Every such claim shall be signed by the garage keeper or by a person authorized by him to do so.

(3) The registration clerk shall cause an alphabetical index to be kept of all claims of lien filed with him according to the make of the motor vehicle and setting out the model, year and serial number of the motor vehicle to which the claim relates, and shall cause to be endorsed upon each claim received by him the time and date of its receipt.

7.—(1) A lien mentioned in section 4 shall be postponed to the interest of a purchaser for value who purchases:

- (a) in good faith;
- (b) without express notice of the lien;
- (c) at a time during which the motor vehicle is not in the possession of the person entitled to the lien under this Act; and
- (d) before the filing of the lien claimed pursuant to this Act.

(2) Every lien upon a motor vehicle under this Act shall have priority to the interest of a vendor under a conditional sales agreement or of a mortgagee or chargee under a chattel mortgage whether or not such interest was created or arose before or after the creation of the lien claimed pursuant to this Act.

8.—(1) Notwithstanding anything in this Act, a lienholder under section 4 is not entitled, in the exercise of his rights under this Act, to prejudice the rights of a purchaser within the meaning of subsection (1) of section 7.

(2) Where a purchaser within the meaning of subsection (1) of section 7 owes any moneys to a vendor under a conditional sales agreement or a mortgagee or chargee under a chattel mortgage and the condi-

tional sale or mortgage arose before the creation of a lien under this Act, the purchaser:

- (a) shall pay to the lienholder under this Act the moneys due and owing to the vendor, mortgagee or chargee, to an amount not exceeding the amount owed to the lienholder under this Act; and
- (b) shall be credited by the vendor, mortgagee or chargee with the amount paid pursuant to clause (a).

9.—(1) If at any time more persons than one have a lien under this Act upon the same motor vehicle:

- (a) the person whose lien came into effect earlier in time has a prior lien over that of the person whose lien came into effect later in time; and
- (b) if one of such persons causes a seizure to be made of the motor vehicle, he shall be deemed to have made that seizure on behalf of all persons who have upon the motor vehicle a lien subsisting at the time of seizure.

(2) If at any time a person has more than one lien under this Act on the same motor vehicle, seizure of the motor vehicle under any one of the liens constitutes a seizure in respect of all the liens of that person on the motor vehicle.

10.—(1) Upon the filing of a claim of lien pursuant to section 4 of this Act the lien continues for a further period of six months from the date of filing.

(2) A lien in respect of which a claim is filed under section 4 of this Act ceases and determines upon the expiry of six months from the date of filing thereof unless within the period of six months:

- (a) there is issued and delivered to the sheriff a true copy of the lien and a warrant in form C addressed to the sheriff or deputy sheriff whose office is nearest to the place where the motor vehicle is at the time of the issue of the warrant and directing the sheriff or deputy sheriff to seize the motor vehicle and return it to the garage keeper; and
- (b) seizure of the motor vehicle subject to the lien has been effected.

(3) Notwithstanding subsection (2), where it appears that a seizure cannot be effected within the six months provided for in that subsection, a judge may, on *ex parte* application made during those six months, extend the time within which the seizure may be made for a further period not exceeding six months from the date of the order, and in that case the lien does not cease and determine until the date so specified, if a certified copy of the order is filed with the registration clerk prior to the expiration of the six months' period provided for in subsection (2).

11. The sheriff or deputy sheriff shall seize the motor vehicle if it is found in Saskatchewan and shall deliver it to the garage keeper or his agent at the place at which it is to be kept under seizure by the sheriff or deputy sheriff upon receipt of the amount of the fees payable in respect of the warrant and seizure.

12. Upon the delivery of a motor vehicle seized under the provisions of section 11 the garage keeper has the same rights and remedies for enforcing his lien against the motor vehicle as if he then had a possessory lien for the same amount as the amount of the lien that he has pursuant to section 4 and he may enforce the lien in the manner hereinafter mentioned.

13. If the amount payable to the garage keeper for services upon the motor vehicle has not been paid:

- (a) within six months after the date that the services upon the motor vehicle were completed or furnished, in the case where the garage keeper retains possession of the motor vehicle; or
- (b) upon the expiration of the period of six months mentioned in subsection (1) of section 10 or upon the expiration of sixty days from the date of the delivery of the motor vehicle to the garage keeper under section 11, whichever is the later, in the case where the garage keeper has not retained possession of the motor vehicle;

the garage keeper may sell the motor vehicle or any part thereof at public auction.

14. Before a sale is held a garage keeper shall insert in the *Gazette* and in a newspaper circulating in the locality in which the services were performed at least two weeks before the date of the intended sale a notice of intended sale stating:

- (a) the name so far as known of the owner of the motor vehicle to be sold;
- (b) a general description of the vehicle, including its serial number;
- (c) the time and place of sale; and
- (d) the name of the person who is to act as auctioneer.

15.—(1) The proceeds of the sale shall be applied in payment of:

- (a) the cost of seizure of the motor vehicle;
- (b) the costs of advertising the sale, the auctioneer's fee and other reasonable costs of the sale;
- (c) the claim of a prior lienholder, if any, under this Act or any former *Garage Keepers Act*;

- (d) the claim of any purchaser under subsection (1) of section 7;
 - (e) the amount payable to the garage keeper for services; and
 - (f) the claim of any other lienholder;
- and the surplus, if any, shall on application be paid to the person entitled thereto.

(2) If that person does not apply for the surplus within one month from the day of sale, the surplus shall be handed over to the Provincial Treasurer to be kept by him in a special trust account for one year, after which, if that person does not claim it, the surplus shall be paid into and belong to the consolidated fund.

16.—(1) No garage keeper shall operate or permit to be operated, outside his premises, any motor vehicle, or use or permit to be used, any part of a motor vehicle left with him for service or held by him; but nothing in this section applies to the operation of a motor vehicle for the sole purpose of testing it either before or after making repairs thereto or supplying parts therefor or of transferring it to the place at which it is to be sold pursuant to this Act.

(2) A garage keeper who violates subsection (1) is guilty of an offence and liable on summary conviction to a fine of not less than \$25 or more than \$200.

17. Every garage keeper shall keep a copy of this Act conspicuously posted in the office and in at least two other conspicuous places in the garage, and unless he complies with this section he shall not be entitled to the benefits of this Act.

18. The Lieutenant Governor in Council may prescribe a tariff of fees to be charged for registering any documents, issuing any certificate and for rendering any other services under this Act.

19.—(1) Subject to subsection (2), *The Garage Keepers Act*, being chapter 279 of *The Revised Statutes of Saskatchewan, 1965*, and *An Act to amend The Garage Keepers Act*, being chapter 27 of the *Statutes of Saskatchewan, 1968*, are repealed.

(2) Notwithstanding subsection (1), the provisions of the Acts referred to in that subsection shall continue to apply with respect to a garage keeper's lien in existence at the time of coming into force of this Act and for the purpose of such lien the said provisions are deemed to be in full force and effect.

20. This Act comes into force on a day to be fixed by proclamation of the Lieutenant Governor.

SCHEDULE

FORM A.

(Section 6)

CLAIM OF LIEN.

(Name of claimant) of (address of claimant) carrying on the business of a garage keeper at (give address) pursuant to *The Garage Keepers Act, 1970* claims a lien upon a certain vehicle (set out the licence number, if any, of the vehicle and the make, style, year and model thereof and the serial number of the vehicle and its engine) in respect of (insert particulars of the services rendered) for (state name and address) and which were completed on (state date of completion of services).

The amount for which the lien is claimed is the sum of \$.

The address for service of the claimant is .

Dated at this day of , 19 .
(Signature of the claimant or his authorized agent)

FORM B.

(Section 6)

AFFIDAVIT VERIFYING CLAIM.

I, (name of person by whom the claim of lien is signed) make oath and say that the statements set out in the annexed claim are true and that I have full knowledge of such facts.

Sworn before me at
in the Province of Saskatchewan this
day of , 19 .
Commissioner for Oaths
(or as the case may be.)

FORM C.

(Section 10)

WARRANT TO SHERIFF.

To the Sheriff at the Judicial Centre of .

Under and by virtue of the power and authority contained in *The Garage Keepers Act, 1970*, a claim of lien (form A) dated the day of , 19 , and an affidavit (form B) having been filed in the office of the registration clerk for the Province of Saskatchewan at Regina on the day of , 19 , and true copies being hereto attached:

You are hereby authorized and empowered by yourself or your deputy sheriff to seize the motor vehicle described in the said claim of lien, if found within the Province of Saskatchewan, and deliver the vehicle to me or my agent at the place where the same is kept under seizure.

I, (or we,) hereby agree to protect and indemnify you and your deputy sheriff against any and all claims for damages and costs that may be made against you or your deputy sheriff by reason of your acts or the acts of your deputy sheriff under this authority.

And this shall be your warrant for so doing.

Dated at , Saskatchewan, this day of , 19 .

Witness:

Signature Signature
Address Address

